$5,000,000, of a total issue of the par value of $5,100,000. It was provided that the District should deposit the $5,000,000 bonds with the International Trust Company of Denver, Colorado, as trustee, to be distributed by the latter in payment of the waterworks, rights of way, reservoirs, etc., when and as completed in manner specifically indicated in the contract. A right was reserved in the contract to the District to sell the bonds and if it was unable to do so, then the Construction Company was to have the exclusive right to sell or dispose of them or any of them remaining in the hands of the trustee which, upon request of the Construction Company, was to deliver to it any quantity of the bonds upon payment to the trustee of 95% of the par value thereof in cash; such cash to be held by the trustee in lieu of the bonds sold. The contract provided that the Construction Company was to commence actual work with a full force of men within thirty days after its acceptance of the contract and to fully complete the work required under it on or before December 1, 1910.

The $5,100,000 par value of the bonds were issued by the District and dated December 1, 1909, and it appears on their face that the issue was authorized by a vote of qualified electors of the District at an election held therein October 4, 1909. The evidence tends to show that there were about fifty families in the District, which consisted of 125,000 acres.

December 20, 1909, a contract was entered into which is described as the "Trust Agreement;" there were three parties to this agreement, namely, the District, the Construction Company and the defendants under the name and title of Farson Son & Co. This agreement recites the issuance of the bonds of the District, the execution of the Construction contract of September 8, 1909; that Farson Son & Co., by agreement with the parties, was named as trustee under the Construction contract in lieu of the Internationa

$2,000,000, of a total issue of the par value of $5,100,000. It was provided that the District should deposit the $5,000,000 bonds with the International Trust Company of Denver, Colorado, as trustee, to be distributed by the latter in payment of the waterworks, rights of way, reservoirs, etc., when and as completed in manner specifically indicated in the contract. A right was reserved in the contract to the District to sell the bonds and if it was unable to do so, then the Construction Company was to have the exclusive right to sell or dispose of them or any of them remaining in the hands of the trustee which, upon request of the Construction Company, was to deliver to it any quantity of the bonds upon payment to the trustee of 98% of the par value thereof in cash; such cash to be held by the trustee in lieu of the bonds sold. The contract provided that the Construction Company was to commence actual work with a full force of men within thirty days after its acceptance of the contract and to fully complete the work required under it on or before December 1, 1910.

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December 30, 1909, a contract was entered into which is described as the "Trust Agreement;" there were three parties to this agreement, namely, the District, the Construction Company and the defendants under the name and title of Parson Son & Co. This agreement recites the issuance of the bonds of the District, the execution of the Construction contract of September 8, 1909; that Parson Son & Co., by agreement with the parties, was named as trustee under the Construction contract in lieu of the International

Trust Company of Denver; that $4,100,000 par value of the bonds of the District was to be deposited with Farson Son & Co.; that $1,000,000 of the bonds was to be delivered to the Construction Company as a first payment under the Construction contract; that the Construction Company was to purchase outright $50,000 of the bonds; and the Construction Company was given the right to sell and dispose of any of the bonds referred to in the two last mentioned sums, together with interest coupons known as #1 and #2 attached to $4,000,000 of the bonds.

The trust agreement set out in specific terms the entire irrigating system, part of which was to be constructed and part purchased by the Construction Company and turned over to the District as provided by the agreement.

On the same day that the trust agreement was entered into, the Construction Company, as party of the first part, and Farson Son & Co., as party of the second part, entered into an agreement known as the "Purchase Contract." A copy of the Construction Contract was attached to this agreement and made a part thereof. Under the Purchase Contract defendants agreed to purchase from the Construction Company $4,050,000 of the District bonds, deposited with the defendants as trustee, at a price of 83½ on the dollar. Under this contract defendants agreed to take up each month beginning January 10, 1910, an amount of the bonds "the cash proceeds of which at eighty-two and one-half (82½) cents on one dollar flat, will cover the estimate for work performed by said first party as shown by estimates made by the engineer in charge of the work, and duly approved by the proper officials of the District, but not to exceed the maximum sum of One Hundred Twenty-five Thousand ($125,000) Dollars in cash in any one month, which method of payment will continue over the period of time required for the completion of said reservoirs, ditches, canals, tunnels and complete irrigating system."

Trust Company of Denver; that $4,500,000 par value of the bonds of the District was to be deposited with Parson Son & Co.; that $1,000,000 of the bonds was to be delivered to the Construction Company as a first payment under the Construction contract; that the Construction Company was to purchase outright $850,000 of the bonds; and the Construction Company was given the right to sell and dispose of any of the bonds referred to in the two last mentioned sums, together with interest coupons known as #3 and #2 attached to $4,000,000 of the bonds.

The trust agreement set out in specific terms the entire irrigating system, part of which was to be constructed and part purchased by the Construction Company and turned over to the District as provided by the agreement.

On the same day that the trust agreement was entered into, the Construction Company, as party of the first part, and Parson Son & Co., as party of the second part, entered into an agreement known as the "Purchase Contract." A copy of the Construction Contract was attached to this agreement and made a part thereof. Under the Purchase Contract defendants agreed to purchase from the Construction Company $4,000,000 of the District bonds, deposited with the defendants as trustee, at a price of 88½ on the dollar. Under this contract defendants agreed to take up each month beginning January 10, 1910, an amount of the bonds "the cash proceeds of which at eighty-two and one-half (82½) cents on the dollar, will cover the estimate for work performed by said first party as shown by estimates made by the engineer in charge of the work, and duly approved by the proper officials of the District, but not to exceed the maximum sum of One Hundred Twenty-Five Thousand ($125,000) Dollars in each in any one month, which method of payment will continue over the period of time required for the completion of said reservoirs, ditches, canals, tunnels and complete irrigating system."

Under other provisions of this contract the defendants were to take up $500,000 of the bonds at a price of 89½¢ on the dollar for the purpose of redeeming certain indebtedness of the Construction Company. Under this contract defendants obtained from the Construction Company an option to purchase the bonds above referred to at 82½¢ on the dollar, the $1,000,000 of bonds which were to be delivered to the Construction Company by the District in payment of certain rights, etc., were to be disposed of "to the mutual satisfaction of the parties hereto by a separate contract in regard thereto;" defendants might exercise their option and take up all of the $4,000,000 of bonds by depositing with themselves as trustees 95% in cash of the par value of the bonds so taken up, and defendants were to hold the bonds as trustees until they, defendants, purchased and paid for them.

A contract was entered into between Messrs. D. A. Cumfield, S. H. Shields, W. S. Kliff, Charles F. Tew and others, and defendants, which recited that the individuals named were the owners of $994,000.01 of the bonds of the District which apparently constitute the $1,000,000 of bonds issued to the Construction Company.

The contracts and agreements referred to are somewhat lengthy, and we have attempted to indicate here only their main provisions. So far as the evidence in the record shows, defendants' ownership or right to purchase any of the $8,100,000 bonds issued by the District is set out in these instruments. The evidence does not disclose that defendants in fact had exercised their option to purchase these bonds nor that they had ever become owners of any considerable quantity thereof. The Construction Contract between the District and the Construction Company specifically provided that the bonds were not to be sold or disposed of unless upon a net return of 95% of their par value. Notwithstanding that this contract was made a part of the trust agreement under which the de-

fendants assumed to act as trustees, they agreed with the Construction Company to purchase the bonds in question at a price of 87½ upon the dollar.

December 30, 1909, defendants wrote to plaintiff in part as follows:

> "We are pleased to be able to present to you our first advance subscription offering of our new Municipal Irrigation Loan, viz:
>
> County of Weld, Colorado, 6% Water Bonds
> (Greeley-Poudre Irrigation District)
>
> with the suggestion that you take a round block.
>
> This new District adds 128,000 acres to the famous Greeley District, Greeley, Colo. This loan is of the same character as the County of Montezuma, the County of Morgan, and the County of Logan, Colorado, which issues we recently handled.
>
> So attractive is this issue that we desire a few of our good friends to get in early, and we are therefore giving you this advance information. Full details in the way of maps, engineers' reports, attorneys' opinions, court decrees, etc., will be ready in due course. The bonds will be dated December 1, 1909.
>
> These are Municipal bonds -- issued by a vote of the tax payers and payable by direct taxation. The district is organized under the State laws and is similar in all respects to a school district. The taxes are extended on the same duplicates with all other taxes, and are collected by the County Treasurer, who is ex-officio treasurer of the District."

It will be noted that in this letter the bonds are described as "County of Weld, Colorado, 6% Water Bonds." Following this description, in brackets, are the words "Greeley-Poudre Irrigation District." The letter further advises plaintiff that the bonds are of the same character as bonds issued by the County of Montezuma, the County of Morgan, and the County of Logan, which issues "we recently handled." This letter further advised plaintiff that matters which made the bond issue stand out pre-eminently were:

> (1) Enough available direct flow of water, over 153,000 acre-feet, to more than furnish one acre-foot to the entire district, also storage capacity of over 100,000 acre-feet and a fixed water supply of over 50,000 acre-feet. Experience has taught in the old Greeley District, that one acre-foot of water was sufficient for irrigation. It is easily seen, therefore, that this District really has an over-supply of water."

The letter in other respects was highly eulogistic of the system to construct and purchase which the bonds had been issued.

In a circular which accompanied the letter the defendants say:

"Preliminary Offering
(subject to correction)
We Own and Offer: Circular #10246
$5,100,000

COUNTY OF WELD, Colo., MUNICIPAL
WATER 6's.
GREELEY-POUDRE IRRIGATION DISTRICT."

In this circular the Greeley-Poudre Irrigation District is described as a municipal corporation organized under the laws of the State of Colorado; that "the bonds were examined into and the organization of the district approved by the Hon. Charles D. Hayt, formerly Chief Justice of the Supreme Court of Colorado. The district is in all respects similar to a school district. The taxes are extended on the same duplicates as all other taxes and are collected by the County Treasurer, who is ex-officio Treasurer of the District." This circular is highly laudatory of the value of the land in the district when irrigated, and it stated that:

> "Under the law an issue of this kind is a prior lien over any subsequent bond issued by the district and to any indebtedness of any character.
> In order to cover any contingencies, the annual tax levy is 15% in excess of the requirements for interest and maintenance charges. The County Commissioners are required to fix the rate of the tax levy necessary to provide the amount required to pay the interest and principal of the bonds.
> The County Treasurer is ex-officio Treasurer of the Irrigation District, and it is his duty to collect and receipt for all taxes levied for these bonds in the same manner and at the same time as is required for collecting taxes for other purposes on the real estate and personal property for county purposes."

A map was mailed to and received by plaintiff with the circular and letter.

January 20, 1910, plaintiff called upon Mr. John Farson, one of the defendants, who referred him to an employee, a Mr. Parrott. Plaintiff testified that he informed Mr. Parrott that he had received the letter and circular and that he desired to talk with him about Weld County bonds; that Mr. Parrott informed him that Farson Son & Co. had bought the entire issue of $5,100,000 Weld County bonds, and that he considered it the best investment they had ever made; that

the district consisted of 125,000 acres, all of which was irrigated except 25,000 acres, which lay in a higher position, and as to which machinery was being installed to provide water thereon; that the 100,000 acres of irrigated land was worth $300 an acre, and that the unirrigated 25,000 acres was worth $50 an acre; that he, Mr. Parrott, made other material representations as to an abundant water supply for the land; that "they have got the finest waterworks that there is in Colorado on this land." Plaintiff testified that relying upon these representations he purchased the bonds and that he received an acknowledgment signed by defendants, by Parrott, acknowledging a subscription for $5,000 County of Weld, Colorado, Municipal Water 6's (Greeley-Poudre Irrigating District.)" The words "County of Weld, Colorado," appear in the acknowledgment in large type. A receipt was also given to plaintiff for the sum of $5,046.67 paid by plaintiff for the bonds. This receipt makes no mention at all of Greeley-Poudre Irrigation District; it is as follows:

"Samuel P. Parnly,
Chicago, Ills.
Jan. 27, 1910.

Chicago.

Sold
5000 Weld County Colo. Water 6s @ 100 5000
Int. from Dec.1-1 mo. 26 days 46.67

5046.67

Due 1000 Dec. 1-1922 $1555/6
Due 2000 Dec. 1-1923 $2031/4
Due 2000 Dec. 1-1924 $2777/80
PAID
Jan. 27, 1910
HARGOR SON & COMPANY
Per Harold Osborne."

Interest due on the bonds for the years 1910 and 1911 was paid. When interest coupons for June, 1912, became due plaintiff received a letter from defendants to the effect that the Construction Company was temporarily not in a financial condition to proceed with the work, and plaintiff was informed therein that it was defendant's opinion that the Construction Company's embar-

rassment was only temporary and that the whole proposition was fundamentally sound. Plaintiff testified that when he received this letter he called on Mr. Parrett, who informed him that the treasurer "had been a little slow about collecting the taxes; *** that it would be all right within a few days." Thereafter, on June 18, 1912, the June, 1912 interest was paid by defendants to plaintiff. Two days prior thereto the defendants entered into a contract with the Construction Company and the District under the terms of which the trust agreement and the purchase contract for the $4,050,000 of the District bonds were revoked. Under this agreement the defendants were to provide money for the payment of interest due June 1, 1912, on all outstanding bonds of the District. The Chicago Title & Trust Company was substituted as trustee in lieu of defendants and defendants were released by the Construction Company and the District from any liability arising out of the purchase contract. Under this last agreement the defendants turned over to the Chicago Title & Trust Company bonds of the District amounting to something over $2,000,000. It appears also that on November 1, 1912, the defendants and the individuals heretofore named, Canfield, Shields, Moore, Gunther and others, entered into a contract revoking the purchase contract for the $1,000,000 of bonds. It is a fair inference that defendants by the two contracts last referred to sought to avoid the responsibility imposed upon them by their acceptance of the trust agreement and by their unquestioned representation that they had purchased and were the owners of the bonds in question. Plaintiff insists that he knew nothing about the construction contract of September 3, 1909, and from the evidence it is quite certain that he believed, at least, that he had purchased bonds issued by the County of Weld, Colorado, and which were owned by the defendants. The evidence does disclose that after plaintiff had become apprised of the fact that the bonds were not in fact the bonds of the County of Weld, that they were issued by the Greeley-Poudre District, and

that defendants had not purchased the bonds in such manner that funds were available for the purchase and completion of the irrigation system, he at once made a tender of the bonds, together with interest which had been paid thereon, and interest on the interest, to defendants and demanded a return of the $6,046.67 paid by him to them. The tender was refused and the present action was begun. The District defaulted in payment of interest due on the bonds in December, 1912.

It is undisputed that the irrigation system provided for by the construction contract was not completed solely because bonds could not be sold in such quantities as would furnish sufficient funds to complete the contract. Plaintiff testified that in December, 1912, he called at defendants' office and asked Mr. Parrott why the interest then due had not been paid and whether the taxes had not been paid, and plaintiff was informed by Parrott that the interest "was not paid from the taxes;" that "it was paid from the taxes on the land."

The written statement of defendants that they owned the entire issue of the bonds issued by the District was "a material representation and evidence of its falsity tends in some degree to establish the claim of plaintiff that he was induced to purchase the bonds by false representations. If the statement had been true it would follow as a natural inference therefrom that the District would have had sufficient funds to complete the work provided for under the contract and it would be unlikely in that event that it would default in the payment of interest coupons.

On cross-examination Mr. William Farson, the only defendant who testified, said:

> "I understood we had contracted to buy the bonds and we owned them. My understanding was that we had bought a contract for all these bonds. We probably would not own them if we did not pay for them. We paid for the ones that were delivered to us. We did not pay for those that we turned back."

[illegible]

This statement constitutes a somewhat ambiguous claim of ownership of the bonds. On the same day and presumably as part of a single transaction, the defendants entered into an agreement with the Construction Company and with the District, under which defendants were selected as trustees for all of the parties having an interest in a proper distribution of the bonds and also it entered into a contract with the Construction Company under which a right was reserved to defendants to purchase the bonds, and it is evident that their present claim that they were in fact owners of the bonds is based upon the latter contract. The defendants by these contemporaneous agreements assumed to act in a dual capacity with reference to the bonds; first, they agreed to act as trustees thereof, and secondly, they entered into an option contract for their purchase at 82½¢ on the dollar. Evidence tends to show that by defendants' exercise of whatever rights were bestowed upon them by this purchase contract they were enabled to obtain large profits in dealing in the bonds.

Notwithstanding the pre-arranged plan whereby defendants sought to claim a technical ownership in the bonds, we think the jury were warranted in believing that they did not at any time own or attempt to acquire title to any of the bonds except when and in so far as they were able to sell quantities of them to their customers. The construction work on the project was discontinued in 1913 as the result of a failure to procure funds by a sale of the bonds.

A Colorado law provided that in no event should the District sell any of the bonds for less than 96% of the face value thereof. Notwithstanding this law, defendants, while acting as trustees, entered into an agreement to purchase the bonds at 82½¢ on the dollar.

Further, the jury were warranted in finding that defendants did represent to plaintiff that the bonds in question were

issued by Weld County, Colorado. It is true that in the letter and circular referred to the words, "Greeley-Poudre Irrigation Company" appear sometimes in small type and in brackets under the words "Weld County, Colorado, Municipal Water 6's. Taken together the circular and letter furnished ample grounds for a finding that they were so drawn as to lead prospective purchasers of the bonds to believe that they were issued by Weld County, and not by a district containing but a few families engaged in dry farming. The defendants represented, and we think falsely, that the bond issue was a first lien on the irrigation system. The language of the circular is that the bonds in question constituted a lien prior to any indebtedness of any character. The sentence in which this clause appears is not in and of itself an evidence of fair dealing, to say the least. Its language is:

> "Under the law an issue of this kind is a prior lien to any subsequent bond issue by the District and to any indebtedness of any character."

An unsuspecting reader of this statement might easily conclude that the bonds in question constituted a first lien against the property of the District. While the statement needlessly sets out that the issue constituted a prior lien to any subsequent bond issue, it was well calculated in its concluding clause to lead plaintiff and others to believe that the issue did in fact take priority over every and all claims against the District. The evidence shows that the District did lose property of considerable value by virtue of a bonded indebtedness existing at the time the bonds in question were issued.

The letter and circular and plaintiff's testimony tend to show that the defendants represented the bonds in question to be Municipal Water bonds of Weld County, Colorado; they were skillfully drawn to create a belief that the bonds were County water bonds and not the bonds of a newly organized and sparsely

settled district. The letter specifically stated that the loan was of the same character as loans of three other counties in Colorado, which were handled by defendants.

In speaking of the engineer's report of the property the circular stated:

> "It was on his report that we bought the bonds of the well known and successful districts: - County of Logan, County of Morgan and County of Montezuma."

The evidence also tends to support plaintiff's contention that the defendants knowingly misrepresented the facts concerning the supply of water available for the district. These were not matters of mere opinion; they were statements of a fact or facts apparently made for the purpose of procuring a sale of the bonds and upon which the plaintiff might reasonably rely.

Assuming for the moment that no special duty was imposed by the law upon defendants as trustees, and even though it could be said that they were dealing at arm's length with the plaintiff, they were not thereby absolved from a legal duty not to misrepresent any material fact as to the title or value of the securities. The evidence shows that plaintiff knew nothing whatsoever of the existence of the several contracts and agreements whereby a colorable right to claim ownership of the bonds was bestowed upon defendants.

It is urged that it is an established rule that when a person is induced through fraud or misrepresentations to enter into a contract, and particularly a speculative investment such as the one in question, he must immediately upon discovery of the facts elect whether to rescind the transaction or waive the fraud. While we are not prepared to hold that the present transaction can fairly be described as a speculative investment, we are otherwise not inclined to dispute the general correctness of this contention. As we have said, the evidence tends to prove that the plaintiff had no knowledge whatsoever of the alleged falsity of the statements made

to him both orally and in writing until a short time before he tendered the bonds and interest money to defendants. This statement of plaintiff is borne out by the fact that believing, as he appears to have done, that the bonds were the bonds of Weld County, Colorado, and that they were all owned by defendants, he would have no reason to suspect the fraud which became evident on investigation when default was made in the payment of interest in December, 1912. Plaintiff thereafter, with reasonable promptness, tendered back the bonds and payment made to him. Plaintiff was 72 years of age at the time of the transaction, and the lands which were to be irrigated under the project were located in Colorado, where resided many of the persons connected with the bond transactions. Plaintiff's testimony is that his first information came from Parrott, defendant's agent, that interest was not to be paid from taxes; that he, plaintiff, became "astonished at the whole transaction; I didn't know what to do; I didn't know anybody that had bought any of the bonds."

We think the trial court was warranted in finding that the defendants were in facts trustees of the bonds in question. It is true that a formal contract gave them an optional right to purchase the bonds, but on the whole record it does not appear that title to any of the bonds was ever actually conferred upon defendants, and there is much reason to believe that they dealt with them in the main as trustees. If they were in fact owners of the bonds which they sold to the plaintiff, the latter would take no greater right in them than defendants held at the time of the purchase. Babcock v. Farwell, 245 Ill., 14. The evidence shows that the plaintiff relied solely upon the honor and knowledge of defendants and the fact that plaintiff had received interest payments on the bonds and had shown a disposition to accept at their face value the truth of the statements made to him by defendants or their agent, Parrott, cannot fairly be said to have charged plaintiff with laches

or to furnish a sufficient reason for the application here of the doctrine of waiver.

In Voorhees v. Campbell, 275 Ill., 302, the Supreme court held that even a failure to use diligence would be excused where there is a relation of trust and confidence which renders it the duty of the party committing a fraud to disclose the truth to the other. Gilman Ry. Company v. Kelly, 77 Ill., 426.

No reversible error was committed in the argument of counsel for plaintiff to the jury, nor do we think that reversible error was committed in giving to the jury plaintiff's tendered instruction number 3, for the reason, as asserted, that it did not inform the jury that if plaintiff waived the alleged fraud perpetrated upon him by defendants he could not recover. The question of waiver does not seem to have been presented to the trial court by defendants either by tendering an instruction involving the principle of waiver or otherwise. An instruction given for the defendants sets out the elements which the plaintiff was required to prove to make out his case and, like instruction number 3, it makes no mention of the subject of waiver. Under the special count plaintiff was required only to prove the facts which defendants' instruction informed the jury were material. Instruction number 8 is not peremptory and does not direct the jury as to its verdict; it merely informed the jury that it would be sufficient if plaintiff proved by a preponderance of the evidence some of the material misrepresentations charged against defendants. No reversible error was committed by the trial court in refusing to give or in giving other instructions, nor do we think such error was committed in rulings upon the admissibility of evidence.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

336 - 27294

HARRY J. PARKER,
Appellee,

vs.

JOSEPH THOMAS,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

223 I.A. 613

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment was entered upon a verdict of a jury in favor of the plaintiff for $1,000, which defendant seeks to reverse by his appeal to this court.

The cause of action grew out of a collision which occurred March 30, 1920, between two automobiles at the corner of Thirty-fifth street and Halsted street in the City of Chicago.

For the defendant it is said that the court erred in rulings on the admission of evidence; that there was no competent evidence before the jury by which plaintiff's damages could be determined and that the verdict is excessive. It was shown on the trial that a Reo automobile was purchased by plaintiff about four months before the accident; that the price of new cars of this model at the time plaintiff purchased the automobile was $1875.00. A Reo salesman testified that he appraised the vehicle after the accident and that he placed a valuation thereon of $775.00, and that this sum was allowed to plaintiff by the witness' employer on the purchase price of a new car.

To begin with, it is our opinion that this witness, whose business it was to sell Reo cars, was qualified to state, as he did state, that the value and price of the automobile when new was $1875. This was the price, he testified, at which the automobile when new was sold to plaintiff. He testified that he

had been selling automobiles for the Reo Automobile Company for five years; that he saw the machine when he appraized it after the accident; that he was familiar with the values of new and used or second-hand cars; that for two years he had been in the business of appraising cars for trade. He described the condition of the car as it was on March 20, 1920, and he testified that its value was then as stated $776. We think this evidence was admissible and that it tended to support the contention of plaintiff.

It is our opinion further that the trial Judge did not err when he permitted the plaintiff to testify that after the accident plaintiff had followed defendant's car along the street to verify a license number thereon; that as he did so a Yellow cab pulled up alongside of the car driven by Thomas, and a number of jugs of whiskey were transferred therefrom to the Yellow cab. While the court did rule on objection that the phrase "they were jugs of whiskey" might stand, this ruling was later somewhat corrected by the witness, who stated that "they were five gallon jugs, grey jugs." We do not think that this ruling of the Judge constituted such serious error as would warrant a reversal of the judgment, nor are we convinced that the judgment is so excessive as to indicate that the jury which tried the case was moved to render its verdict through passion or prejudice.

The plaintiff testified that as result of the accident he was painfully injured; that he was confined to his home for a period of two weeks and was attended by a doctor. The damages awarded plaintiff were not excessive.

The judgment of the Superior court is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

376 - 27334

E. A. ROESSEL,
Appellee,

vs.

HENRY SULLIVAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 613

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal court of Chicago. The cause was tried by the court without a jury and judgment was entered against defendant for $40.00 and costs of suit.

The plaintiff called defendant under section 33 of the Municipal Court Act, and his testimony constitutes the only evidence offered by plaintiff in support of his claim. Defendant testified that he was the agent of John T. and Margaret Withington, owners of an apartment building at 4602 Chamblain avenue, Chicago; that Mr. and Mrs. Roessel deposited five dollars with him, for which he gave them a receipt; and that later he received forty-five dollars when a lease was signed and executed by Mr. and Mrs. Roessel for an apartment in the building; that about a week after this transaction Mrs. Roessel informed defendant that Mr. Roessel was compelled to go to New York and that they did not want the flat. The lease was introduced in evidence. The defendant further testified that after his last conversation with Mrs. Roessel he re-advertised the premises and spent considerable time and expense in doing so; that he gave the money he received from plaintiff to the owners of the property. The above is substantially all the evidence offered in the case, and from it it appears without dispute that the defendant was merely acting as an agent for a principal, which, so far as the evidence discloses, was known to plaintiff. The lease is

dated September 5, 1920, and is signed "Margaret Withington, by Henry Sullivan, her agent." Upon this evidence standing alone a judgment should have been entered in favor of the defendant. Millikin v. Jones, 77 Ill. 573; Shinkeed v. Underwood, 95 Ill. 475.

The judgment against the defendant is erroneous and is reversed with a judgment of nil capiat here.

REVERSED WITH JUDGMENT OF
NIL CAPIAT HERE.

McSurely, P. J., and Matchett, J., concur.

477 - 27435

WILLIAM J. HOFFMAN and
EMIL A. HOFFMAN, Doing
Business as PLANKER &
STICKNER BOLT SUPPLY CO.,
Appellees,

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered in the Municipal court of Chicago against it and in favor of the plaintiffs for $121.37.

The evidence introduced on the trial shows that plaintiffs delivered to defendant, a common carrier, at Chicago, a box of special screws and studs, made for special machinery, consigned to Perkins Windmill Company at Kishawaka, Indiana. One of the plaintiffs testified that he thereafter never saw the goods and that they were never returned to him. It appears from the evidence that plaintiffs made no demand for a return of the property and that Perkins Windmill Company, the consignee, had never made any demand upon defendant for the delivery of the shipment to it.

No appearance is filed in this court on behalf of the plaintiffs. Defendant insists that under the law it was the duty of the consignee to demand a delivery of the goods to it at the point of destination. The shipment was from a point in the State of Illinois to a city in the State of Indiana and was therefore an interstate shipment, and all rights and liabilities connected therewith depend upon acts of Congress. Southern Railway Co. v. Byers, 240 U. S. 612.

The evidence shows that the shipment remained in possession of the defendant for several months after it had re-

ceived the property.

In the case of Grattan Co. Warehouse v. Railroad Co., 221 Ill., 418, it was held that:

> "Carriers by railroad are not bound to deliver the goods carried to the consignee personally, or to give notice of their arrival, to discharge their liability as carriers; and that, when the goods have reached their destination, if the consignee is not present to receive them, the carrier may store them safely in a suitable warehouse to await the demand of the consignee. (Chicago and Alton Railroad Co. v. Scott, 42 Ill. 132; Gregg v. Illinois Central Railroad Co., 147 id. 550.)"

When the goods were received by defendant it issued its bill of lading therefor, and it was the duty of the consignee to demand possession of the property at destination and to present this bill of lading. Barnes Federal Code, section 7885.

The judgment of the Municipal court is reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

53 - 27517

JOHN M. McCLUN,
Defendant in Error,

vs.

HERMAN EMERMAN,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, John M. McClun, recovered a judgment against the defendant, Herman Emerman, on June 11, 1921, in the Circuit Court of Cook County for the sum of $6,250, in an action of assumpsit based upon a claim of plaintiff for real estate brokerage commissions.

Defendant seeks to reverse this judgment by writ of error and also by an appeal therefrom. (#27399) Both cases have been consolidated in this court for hearing.

Plaintiff's declaration consists of the common counts and two special counts the first of which alleged that plaintiff, a licensed real estate broker, was employed as such to sell a building owned by defendant located at #4310-4322 Clarendon avenue, Chicago, Ill.; that defendant had agreed to pay plaintiff a customary commission of 2½% of the consideration received by defendant for his property; that plaintiff had procured one John Brand of Elmira, N. Y., to inspect the premises and that as a result of plaintiff's efforts Brand and defendant arranged a sale thereof at an agreed price of $250,000. The second count is substantially the same as the first.

In an affidavit of defense defendant denied that plaintiff undertook to exchange or sell the property; that defendant had ever promised to pay plaintiff any commission or compensation; that plaintiff had acted as defendant's agent

or that the former had procured Brand as a purchaser for the premises. The affidavit charged that if plaintiff had performed any services in connection with the sale of defendant's property such services were rendered at the instance and request of a broker employed by Brand.

Evidence introduced on the trial tends to show that in the spring of 1918, plaintiff received by mail printed circulars which advised him that defendant had certain properties for sale, among which was the property in question described in the circular as the Junior Terrace Apartments. The circular contained the printed words "Full commission to brokers." On May 21, 1918, one Fox, an employe of plaintiff, wrote defendant acknowledging receipt of the circular and submitting for exchange certain lands in Michigan. On June 6, 1918, Fox again wrote defendant inquiring whether defendant would consider a trade for land in Florida at $15 per acre. In this letter Fox suggested that defendant take 10,000 acres of this land for the latter's Chicago property. Prior to this time one Butterworth, residing in Miami, Fla., had placed the Florida land with plaintiff for exchange and on March 7, 1918, Butterworth wrote to one Wells, also employed by plaintiff, to the effect that the owners of the Florida land were asking $15 an acre for it, but that it could "be bought for about $10 with a 10% commission for selling. We will go 50/50 on all commissions, 10% is the rate here. Get all you can out of your man." This letter was turned over to Fox who later communicated to plaintiff only the fact that the land was for sale at $15 per acre. No information was given to defendant that the land could have been purchased for $10 an acre, nor that its owner was willing to pay a commission on the sale at that price of 10%, nor that in case the Floridaland was sold through plaintiff's efforts the latter was to receive one-half of this large commission. Later, Fox wrote Butterworth

that defendant might be interested in taking the Florida land and that he, Fox, had "suggested an exchange of 10,000 acres at $15 an acre clear for his equity of $155,000 which are the figures we want to work on."

The Florida tract originally consisted of 22,000 acres; this holding was later reduced to 8,500 acres; in nearly if not quite, all of the letters written to defendant by Fox the latter referred to the owner of the Florida property as "our client."

In the latter part of June one Dann, Secretary for John Brand, president of the corporation which owned the Florida land, inspected defendant's property on Clarendon avenue and also certain other property owned by him on Sunnyside avenue in Chicago; he was accompanied by Butterworth, the Miami, Florida, broker, and Fox. Dann then said he would make a report of his findings to Brand. Fox testified that some ten days later Brand came to Chicago and that he introduced him to defendant. Brand, however, said that he did not think he was in Chicago in July and Emerman testified that he never met Brand until sometime in September, 1918. At all events, it is clear that Fox took no further part in negotiations which finally resulted in an exchange of the properties. Nothing came of negotiations had between Brand and defendant looking to an exchange of the Sunnyside Avenue property for the Florida land and later Brand and defendant again, by correspondence, negotiated for an exchange of the Clarendon avenue property. In October, 1918, Brand and defendant finally agreed upon the terms of an exchange of the Clarendon avenue premises for Florida lands of about 9,000 acres, consisting of the 8,500 acres in question and certain acres of a town site and $20,000 in cash.

The evidence in the case is somewhat voluminous and there is a direct contradiction in the testimony about certain facts in issue between the parties. It was stipulated on the trial that plaintiff had entered into an agreement with Butterworth, Brand's broker, whereby they agreed to divide commissions paid for the exchange of the Florida land, and also to divide whatever commissions were received by them or either of them from either Brand or Amerman and whether such commissions were paid in money or property. Defendant had no knowledge of this agreement.

Defendant denied that Fox had ever introduced Brand to him and that he had ever talked with him, Fox, at any time about brokerage or commissions. The evidence shows that Butterworth received as compensation for services rendered to the owner of the Florida property $800 in cash and 400 or 500 acres of land of a value of from $12 to $20 per acre. Brand's testimony is that Butterworth acted generally as his real estate broker and that he had handled a great many real estate transactions for him.

Several reasons urged in this court for a reversal of the judgment need not be touched upon in this opinion. There was, as stated, a conflict in the evidence, touching the correspondence between and the relation of the different persons concerned in bringing about a transfer of the properties. As the case is to be reversed and remanded questions argued concerning the weight of the evidence, the admissibility of part of it, and the action of the court in giving or refusing to give certain instructions, will not be determined as such questions may not again, if the case should be retried, arise.

Plaintiff brings his action on the theory that he was acting in the matter as the agent of defendant. Assuming that he was defendant's agent, as we must assume, if plaintiff is to recover, then the law imposed the duty upon plaintiff to deal

-4-

fairly and openly with defendant. Butterworth, the agent for the owner of the Florida land, informed Fox, who represented plaintiff, that the land could be bought for $10 an acre. If this statement were true and presumably Butterworth, Brand's general agent, who had handled many Florida land deals for him, had actual knowledge of the fact, then this information should have been given defendant. When Fox, speaking as Bowman's agent, informed the latter that the price of the Florida land was $15 an acre when he had reliable and direct information that it could be purchased for $10 an acre, he imposed a fraud upon defendant which the evidence tends to show vitally affected the latter's interest. Butterworth's letter informed defendant that what his Florida client desired was an exchange for "some income stuff;" that that "is what will catch them."

On the record before us it is perfectly clear that defendant, had he been accorded fair treatment, could have traded his Chicago property for the Florida land at $10 per acre, and on this basis Butterworth and plaintiff would have been entitled to a 10% commission; approximately $9,000, and, if defendant is liable for commissions at all, a further sum based upon the value of the Chicago property. Had defendant's agent, if he was in fact his agent, acted with the candor which a sense of fair dealing would require of him he would have received ample and liberal compensation for his services. He preferred, however, to mislead the defendant as to the price at which the Florida land could be purchased, and in doing so, he took the chance of depriving himself of any compensation for whatever services he may have rendered him. Plaintiff's employe did not act out with a purpose to procure an advantageous contract for defendant, on the contrary, he seems to have acted on the advice of Butterworth to "get all you can out of your man."

If plaintiff was defendant's agent then that fact established a relationship between them of trust and confidence.

In the case of Ferry v. Kneal, 206 Ill. 549, the Supreme Court said:

> "The rule is, that if a party employs another as his agent to sell his real estate or exchange it for other real estate, he is entitled to all the agent's skill, ability and industry in making the sale or exchange on the best terms that can be had. * * * The relation of principal and agent is one of trust and confidence, and where such confidence is reposed and such relation exists it must be faithfully acted upon and preserved from any intermixture of imposition. The rule is the same, no matter how large or how small the commission paid may be or whether the agent is a mere volunteer at a nominal consideration."

In the case of Voorhees v. Campbell, 273 Ill. 325, the Supreme Court said that where a relationship of trust and confidence existed between parties it was the duty of the party committing the fraud to disclose the truth to the other. Farwell v. Great Western Telegraph Co., 161 Ill. 522.

It is said that an agreement to pool and divide commissions does not per se defeat plaintiff's right to a recovery. The point may be conceded that one agent may at the same time represent two principals whose interests are adverse. There, however, it is shown, as we think it is here, that one of the principals, the defendant, had no knowledge of the dual capacity in which plaintiff acted the principle contended for will have no application.

It is argued that an agent acting for two principals whose interests are adverse may where the agent is not clothed with any discretion in negotiating a sale or exchange of property be entitled to commissions even though the agent's dual employment is not known to one or either of the principals. There are authorities to the effect that a real estate agent who is given no discretionary power to negotiate a sale may be entitled to commissions from two principals who are merely brought together by the agent, and who thereafter, without his assistance or

advice, negotiate a sale or exchange of property. The evidence here shows that the plaintiff's employe, if his own testimony may be relied upon, took an active part in advising defendant and in representing to him the terms at which the Florida land might be procured. Plaintiff's position is that through his employee he not only brought the parties together, that is introduced them to each other, but that, through his employee he had at different times presented to defendant various propositions for a transfer of the latter's property on advantageous terms.

Notwithstanding the contention that in case of a dual agency to bring principals together only and which invests no discretionary powers in the agent, the latter would be entitled to commissions from both principals, we find in another part of plaintiff's brief a contention made that no dual agency in fact existed. It is asserted that plaintiff's employe was not employed by Brand, but by the latter's agent, Butterworth; that he, Butterworth, employed plaintiff and paid him a commission. If this is the fact, as urged, then plaintiff, if he is to recover, must have acted for defendant only. But whatever the truth of this matter may be, it is our opinion that the evidence shows that plaintiff sustained a relationship toward defendant that required plaintiff to truthfully inform the latter of the price at which the Florida lands could be purchased.

It is not important, as we view the evidence, that the letter to Wells which discloses that the Florida lands could be purchased for $10 an acre was received by him sometime, about three months, before Fox informed defendant that the land was for sale at $15 an acre. The undisputed fact is that Fox knew at the time he made this representation to defendant that the land could be purchased for $10 an acre. Fox, at least, knew that when he introduce Butterworth and Dann to the defendant he was assuming to act as the latter's agent.

The judgment of the Circuit Court is reversed and the cause remanded.

McDurely, P.J., and Matchett, J., concur. REVERSED AND REMANDED.

441 - 27399

JOHN M. McCLAIN,
Appellee,

vs.

HERMAN BERMAN,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered in the Circuit Court of Cook County on June 11, 1931, in favor of the plaintiff for the sum of $6,250.

The cause by order of this court was consolidated for hearing with case #27517 decided at this term of court, and for the reasons stated in the opinion filed in that case, which are adopted here, the judgment of the Circuit Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

55 - 27523

SENNE FUR CO., a Corporation, Appellee, vs. I. WERTHEIMER CORP., a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

223 I.A. 614

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment in the Municipal court of Chicago against the defendant for $300.00, which the defendant seeks to reverse, mainly on the ground that the judgment is against the weight of the evidence. The case was submitted to the court without a jury.

The evidence introduced on the trial tends to show that on May 16, 1921, plaintiff delivered a package of skunk skins to defendant to be dyed. Testimony introduced for the plaintiff is to the effect that the hind paws were on these skins when they were delivered to defendant; that about one-half of the skins did not have these paws on when they were re-delivered to plaintiff; that the skins by reason of the loss of the hind paws had been depreciated $1.75 each. Testimony for the defendant tends to show that some of the skins had the hind paws cut off at the time they were delivered to defendant. Defendant's testimony also tended to prove that "hind paws of skunk skins are worthless and have no value," and also that skins are not depreciated by having the hind paws removed.

There is testimony in the record of at least two witnesses to the effect that when the skins were delivered to defendant none of the hind paws had been removed, and that when re-delivered to plaintiff 321 of such skins had the paws cut off. The evidence upon this question, as also that touching the value of the skins and the effect thereon of the removal of the paws, gave rise to issues

of fact which could be best determined by the trial judge, who had an opportunity to hear and see the witnesses.

There is a direct conflict in the evidence of such character that it is impossible for us to say that the trial Judge erred in entering the judgment appealed from.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

62 - 27531

AGNES E. CRONIN,
Defendant in Error,

vs.

FRANK P. BURKE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

22 [illegible] 614

MR. JUSTICE NEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court to recover the sum of $2000 claimed to be due on a promissory note signed by the defendant and dated May 1, 1916.

The defendant filed an affidavit of merits to plaintiff's statement of claim in the first paragraph of which he set up that he had paid the note in question on January 17, 1918. In the second paragraph of his affidavit defendant alleged that on January 17, 1918, the plaintiff had obtained the sum of $3000 from him by duress and threats; that she had threatened and declared that she would kill him if he did not pay her a large sum of money and that she would file court proceedings against him which would disgrace him in a business and social way, and also that he was not liable to her "except in relation to said note;" that wishing to avoid physical violence, trouble and disgrace, he mortgaged some property he then owned and paid her the sum of $3,000. On motion this paragraph was stricken from the files and defendant asserts that this was error. The paragraph which was stricken recites that defendant was not indebted to plaintiff except upon the note sued on.

Defendant sought a judgment against plaintiff by way of set-off for the sum of $1,000 on the theory, presumably, that because of the duress charged in the second paragraph of his affidavit he had overpaid the note by that sum. The stricken paragraph does not charge that defendant was not indebted to plaintiff; on the con-

trary he admits his liability to her on the note sued on.

The allegation touching the alleged threat to bring legal proceedings against the defendant are altogether too vague and uncertain to constitute a defense to the action begun on the note. The allegation that plaintiff had threatened and declared she would kill defendant if he did not pay her a large sum of money, although he was in no way liable to her except upon the note sued on, is not sufficient to establish the duress set up as a defense. Whether the threats were or were not made, as alleged, it appears from the paragraph that defendant was indebted to plaintiff for a large sum of money, namely, $2,000.

After the second paragraph of the affidavit of merits filed by defendant was stricken, defendant was given leave to file an amended affidavit of merits within five days. Defendant failed to file an amended affidavit within the time allowed and thereafter the cause proceeded to trial before a jury, which rendered a verdict for plaintiff for the amount sued for, $2,000. Judgment was entered upon this verdict. In taking leave to amend the defendant waived his right to question the action of the court in striking the second paragraph of the affidavit of merits from the files. The record does not show that plaintiff thereafter at any time elected to stand by the pleading which was stricken. So far as the record before us shows the parties went to trial before a jury on the pleadings as they stood after the second paragraph had been stricken from the affidavit. If it can be said, as urged by counsel for defendant, that the first and second paragraphs of the affidavit were both pleas of payment, then no injury was done defendant by striking the second paragraph of the affidavit, because its first paragraph set up, as did the second, that defendant had paid the note on January 17, 1918. Upon this first paragraph the case went to trial, and the jury found that the note had not been paid. Hubbard v. National Stamping & Electric Works et al., 113 Ill. App. 335; Hilley v.

McCormick Harvesting Machine Company, 84 Ill. App. 571.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

108 - 27582

SWIFT & COMPANY, a Corporation,
Appellee,

vs.

MONARCH REFRIGERATING COMPANY OF CHICAGO, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action in the Municipal court of Chicago to recover damages which it alleged were caused by the improper and negligent manner in which defendant, engaged in the storage and warehousing business in Chicago, stored and kept a carload of fresh pork which was shipped by plaintiff January 30, 1919, from its packing plant at St. Joseph, Mo., to defendant's warehouse at Chicago, where the shipment was received February 1, 1919. Judgment was entered in favor of the plaintiff for 17,000. Defendant asks us to reverse this judgment and to remand the cause to the trial court for a new trial.

There is ample evidence in the record to the effect that the shipment was in proper condition when it was delivered to the carrier at St. Joseph, Mo., and that it was properly protected by icing during its transit to Chicago, although a record made by a deceased employe of defendant tends to show that the pork when received by defendant was in a soft condition.

Defendant insists that the judgment is not supported by the evidence and, further, that even if defendant were at fault the trial court erred in admitting testimony of two witnesses, Report and Snyder, as to defendant's negligence.

The evidence shows that it is the usual practice when slabs of cut fresh pork are received at warehouses for storage, as in the present case, to pile them in such manner that all parts of

each slab shall be subjected to the cold temperature of the room where kept. In order to effectively freeze the meat it is the practice to place two by fours between layers of the slabs so that the pieces will not touch each other. This process of freezing the meat is described in the evidence as "sharp freezing," and is necessary to prevent or arrest its deterioration.

It is practically undisputed in the record that defendant received the pork in question and piled it in its warehouse without properly providing for this "sharp freezing;" the slabs of pork were placed in a pile about 10 feet high by 15 to 18 feet in length, and the layers were not properly separated so that all of the pork would freeze.

One Linke, a grader for plaintiff, testified that when he examined the pile of pork he found the top and front thereof well frozen, but that the middle and bottom of the pile were soft and packed in such condition that crowbars had to be used to get the pieces apart. That the pork was in fact putrefied and inedible when delivered to plaintiff is not disputed.

One Snyder, a division superintendent for plaintiff, testified that he went to the warehouse August 23, 1919, and looked at the meat in question; that he found it was off-color and that it emitted a very offensive odor; that the pile did not have the appearance of having been solidly frozen in individual pieces; that the meat had settled down and was stuck together in such a manner that crowbars were used to separate the pieces.

It is unnecessary to indicate further the evidence touching the shipping and storing of the meat. It is sufficient to say that the evidence is abundant that its deterioration was caused by a negligent failure to freeze it immediately after its receipt at defendant's warehouse. The evidence tends to disclose that plaintiff used every reasonable precaution after the discovery of

the condition of the pork to minimize the loss. It seems to have been carefully examined and such part of it as was fit for commercial use was preserved.

Michael Espert, a witness for defendant, testified on direct that

> "I had to see to the disposition of the goods received and delivered. I had to direct where to put the goods and note the temperatures, and I saw to the piling of the goods to see that they were properly handled."

This witness had charge of defendant's warehouse until July 1, 1919, and later in August and September, 1919, was employed by defendant at the warehouse. On direct examination he testified that during the months of August and September he met Mr. Snyder, plaintiff's employe, at the warehouse. When asked on direct examination whether he went up stairs on an elevator with Snyder to the place where the pork was stored, he answered "No, sir, I did not;" that he had had no conversation with Snyder with reference to the condition of the pork. He stated that certain of plaintiff's employes were working in and around the warehouse sorting and grading the pork, and that during this time no one had said anything to him about the condition of any meat stored there. Snyder, prior to the giving of Espert's testimony, had testified on direct that he saw Espert at the warehouse on August 23, 1919; that the latter took the witness to the place where the meat was stored, and that he, Espert, had showed witness a large quantity of meat, not in question, stored in the warehouse by plaintiff. A part of the cross-examination of Espert was evidently for the purpose of laying the ground for impeaching him. Snyder, plaintiff's witness, subsequently was called and he gave testimony which tended to impeach the testimony of Espert.

Espert was an important witness for the defendant. He testified that it was his duty to direct where to put the goods

and note the temperatures. In his direct examination he testified that he did not go up stairs on an elevator and show the meat in question to Snyder; that he had no conversation with him in reference to the condition of any pork stored in the warehouse, and that nothing was said to the witness as to the condition of any meat stored there. It was not reversible error to permit Snyder to testify in rebuttal as to the substance of a conversation which Snyder says he had with Aspert at the time in question. The evidence was not admitted as an admission by defendant's agent against defendant's interest, but solely for the purpose of impeaching Aspert's testimony, wherein he denied having any conversation whatsoever with Snyder or anybody else touching the condition of the pork.

In the case of Monence Stone Company v. Groves, 187 Ill., 88, the Supreme Court said:

> "The general manager of the defendant was a witness and he testified that he was directed by the president to look over the machinery and to take no chances; that he inspected the hook carefully before the accident; that he never had any intimation from anyone or any source that it was not a good and sufficient hook. On cross-examination he was asked if he did not make a certain statement in the baggage car when going to Chicago with the plaintiff, and this statement was inconsistent with his testimony. The question was objected to, and the objection was overruled. It is urged that this was error, because the declaration of the manager in the baggage car was not a part of the res gestae and was not binding on the defendant as an admission by its officer. The declaration would not be admissible on either ground, but the question was proper for the reason that the statement was contrary to what the witness had just testified to. Its purpose was to lay the foundation for impeaching evidence."

I. C. R. R. Co. v. Wade, 206 Ill. 523.

Snyder in testifying on direct stated only that he and Aspert were at the place where the meat was stored on a day in August. Thereafter Aspert was placed on the witness stand and he testified that he did not go with Snyder to examine the meat. He also, and in addition, testified that he had no conversation with Snyder in reference to its condition, and that nothing was said to

him by anybody at the time in question about the condition of the meat stored in the warehouse.

There is no merit in the position taken by defendant that plaintiff's case rests "upon a presumption upon a presumption." There is direct evidence to the effect that the pork when received at defendant's warehouse was in good condition. One Quackenbush, who examined the product as it was being unloaded at the warehouse, so testified. There was also the testimony of an United States Government Inspector to the effect that he inspected all meats shipped at St. Joseph, Mo., from the dock where the meat in question was shipped on January 25, 1919, and that it was not possible that the pork then shipped was not wholesome. Other evidence tends to prove that it was properly protected during its transit to Chicago. There is then direct evidence to the effect that the goods were in good condition when delivered at defendant's warehouse; proof of this fact did not rest upon a mere presumption.

It is urged on behalf of defendant that the cause should be reversed and remanded because plaintiff offered no proof of the market value of the pork in question. The pork consisted of what is described in the evidence as "Cumberland cuts." There is proof to the effect that this kind of product is produced for export purposes and that it is not sold in this country. There was, therefore, if this evidence is true, no market for the pork in Chicago. It was, then, under the circumstances of the case, proper to introduce evidence of the market value of the pork in the only market where it was saleable. The proof tends to show that on August 30, 1919, the market price of pork of the kind in question in this market was 35¢ and 36¢ a pound; that the only purchaser of this product was the British Government, and the manager of plaintiff's foreign department testified, from twenty years of service as such, that the value of the pork in the only market where it could be sold, was 35¢ and 36¢ a pound.

Of necessity, in cases like the instant case, a rule must be provided whereby actual damages sustained may be made recoverable, and in cases where it is shown that no market existed either at a particular time or place where damages have accrued, resort may be had to market values nearest in time or place. Within reasonable limits it was proper to introduce evidence tending to show the market value of the product in question in the market nearest to the place where the damages accrued to plaintiff, being the only place where a market existed for the product in question. The evidence tends to show that on August 29, 1919, there was no market at all for the pork. The British Government, its only purchaser, had ceased buying it. The nearest sale in time to that date was on August 25, 1919, at 35¢ a pound net weight C. A. F. New York.

It appearing from the evidence that there was no market value of the product in question at the place where it was stored, it was proper to show the market value thereof in the only market where it was saleable, and evidence of its value in this market plus the costs of transportation constituted a correct measure of damages to be applied in the case. Had there been a market price at the time in question in the Chicago market, a different rule would be applicable. Gray's H. G. Co. v. Turnbull-Joice Lumber Co., 163 Ill. App. 331; 22 Corpus Juris, 190; Nicola Bros. Co. v. Spear Box & Lumber Co., 133 Fed. Rep. 914.

In the case of Penn. R. R. Co. v. John Agda Co., 131 Ill. App. 426, the court said:

> "There was no market quotation at Williamsport. The nearest market where quotations for potatoes obtained was Pittsburgh. This market price was adopted with an allowance for freight. There is no hard and fast rule of fixing values when applied to property at places lacking market quotations. Any method adopted which is obviously fair, and which duly conserves the right and interests of the party sought to be made liable, will satisfy legal requirements."

Reversible error was not committed in instructing the jury orally. The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

125 - 27509

M. KATZMAN,
Appellee,

vs.

M. A. HOTCHKISS, CHICAGO CITY RAILWAY and CHICAGO RAILWAYS CO., Doing Business as CHICAGO SURFACE LINES,

On Appeal of M. A. HOTCHKISS, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment rendered against him in the Municipal court of Chicago and in favor of plaintiff in the sum of $103.45.

The only question argued in the brief filed on behalf of the defendant, M. A. Hotchkiss, is that the finding of the trial Judge, who tried the case without a jury, is not supported by a preponderance of the evidence. It was shown on the trial that on December 11, 1920, an automobile while being operated by defendant, its owner, in an easterly direction on 63rd street in Chicago was run into by a street car running on said street in the same direction and to the rear of the automobile. The collision caused defendant's car to collide with an automobile owned by plaintiff, which was standing near the curb on the south side of 63rd street.

It is insisted on behalf of defendant that the finding of the trial Judge in favor of plaintiff was manifestly against the weight of the evidence. Plaintiff's position is that defendant negligently drove his automobile directly in front of an on-coming street car when the latter was only 15 or 20 feet away from the automobile.

Two apparently disinterested witnesses testified for the plaintiff; the first of these, one Tjader, stated that he was riding on the front platform of the street car which struck de-

fendant's automobile; that when the street car was about 18 feet from defendant's machine he, defendant, turned out from the curb and the car struck "on the left hand side of the running board;" that the machine turned out from the curb and ran "right into the front of the street car." This witness further testified that Hotchkiss, the driver of the automobile, did not give any signal of his intention to drive in front of the approaching street car. The testimony of this witness is corroborated in part by that of one McGanny, who saw a part of the circumstances surrounding the accident from his position on the front platform of the street car.

Defendant's testimony is to the effect that his car had been parked on the south side of 63rd street; that he pulled out from the curb after he had looked and seen a street car coming "quite aways up the street;" that it was a rainy, misty night and the visibility was bad; that when he drove his car out from the curb the street car was behind him a distance of 300 or 400 feet; that the street car gained upon him and that he was unable to drive south of the street car tracks upon which the street car was approaching because of automobiles which were parked along the curbing. There is a direct conflict in the evidence, and, as has been so often held, the trial Judge was in a much better position to determine the reliability of the testimony given by the witnesses than are we. Clearly the evidence in the case does not appear to be so manifestly against the finding of the trial Judge as to authorize a reversal of the judgment. Caldwell v. Chicago City Ry. Co., 211 Ill. App. 310.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

134 - 27698

KASIMIR RODZIEWICZ,
Appellee,

vs.

KATHERINE PAWLAK and
JOSEPH PAWLAK,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment of the Circuit court of Cook County in favor of the plaintiff and against defendant, for the sum of $676.21.

The action was brought upon an appeal bond given in an appeal to this court from a judgment entered against Katherine Pawlak in the Circuit court of Cook County on December 11, 1919. On October 20, 1920, plaintiff filed a short record in this court in the appeal case in which the bond sued on herein was given. The appeal was dismissed November 5, 1920, and the present suit was begun on the bond.

The abstract of record filed here does not by any means comply with the rules of this court. It appears from the abstract that the plaintiff was givenleave to amend an original declaration, a demurrer to which had been sustained. The declaration was thereafter amended and it is said here that the court erred in over-ruling a demurrer to this "supposed amended declaration." We are unable to determine from the abstract of record whether the court erred in entering this order,as the original declaration does not appear in the abstract.

A point is made that the declaration filed in the cause contains no ad damnum clause. A concluding paragraph of the declaration states that plaintiff brought his suit "to demand and have from the defendants the aforesaid sum, to-wit, the sum of one thousand dollars ($1,000.00); yet the defendants, though

often requested, have not paid the same nor any part thereof," etc.

While the allegation of damages to the plaintiff is somewhat informally stated the declaration sufficiently informs defendants of the amount and character of plaintiff's claim. A general demurrer filed to the declaration does not specifically allege the failure to incorporate in the declaration a formal ad damnum allegation. Pleas were filed to the declaration. After the filing of these pleas an affidavit of claim was filed in behalf of plaintiff, and on the same day additional pleas were filed to the declaration. July 5, 1921, the court sustained a demurrer "to the defendant's plea filed in said cause" and leave was given to the plaintiff to file instanter "an affidavit of merits," and defendants were required to file an affidavit of merits within five days. July 6, 1921, a demurrer was filed to the additional pleas and thereafter on July 8, 1921, defendants filed in support of their pleas an affidavit of merits. July 11, 1921, a demurrer to defendant's additional pleas was sustained and the defendant was given leave to file additional pleas within three days, and defendants' affidavit of merits was stricken from the files. Thereafter the defendants filed a plea of the general issue to the declaration. This plea was stricken from the files December 19, 1921, apparently for want of an affidavit of merits. December 24, 1921, an order was entered on motion of plaintiff over-ruling the motion to vacate the order of December 19, 1921. The order of this date, December 24, 1921, further recites that the case was then called for trial and on agreement of the parties to the suit made in open court the cause was submitted to the court for trial without a jury. The court after hearing all the evidence introduced found the issues for the plaintiff and assessed his damages at $676.21. Judgment was entered in plaintiff's favor for this amount. The record before us contains no bill of exceptions. There was incorporated in the record, however, an affidavit

in support of a motion to extend time to file a bill of exceptions, sworn to February 24, 1922, by A. A. Seymour, attorney for defendants, to the effect that the judgment in the case did not speak the truth wherein it recited that the cause was submitted to the court for trial without a jury and that the court entered judgment after hearing all the evidence introduced; that the parties to the suit were not in court at the time judgment was entered, and that the court did not hear any evidence. So far as the record shows no attempt was made in the court below to vacate, amend or correct the judgment, and of course its validity was not affected by the mere filing of this affidavit.

The judgment on its face is somewhat informal, but it is not so much so as to authorize its reversal. The declaration in the case is supported by an affidavit of claim and the pleas filed were properly stricken from the record; they were not supported by an affidavit of merits and were otherwise insufficient. Whether the court's action in striking the pleas from the files was erroneous could be presented in this court only by incorporating in the record a bill of exceptions, and this is true of other questions raised in the brief of counsel for defendant.

In any case the record shows that the parties by agreement submitted the case to the court for trial. Evidence was introduced and judgment entered after a trial of whatever issues may be said to have been presented under the pleadings as they then stood.

The judgment of the Circuit court is affirmed.

AFFIRMED.

McSurely, P. J. and Matchett, J., concur.

S - 26461

ALEXANDER WHITE,
Appellant,

vs.

JOSEPH WOLF and THE JAMES
E. PEPPER DISTILLING COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

Entered
June 5, 1920

22 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant and cross-defendant, Alexander White, from a decree which dismissed his bill for want of equity and granted certain relief prayed for in cross-bills filed by Joseph Wolf and the James E. Pepper Distilling Company.

The bill of complaint, which was filed March 22, 1919, alleged that Alexander White was the owner of a certificate of stock bearing date April 14, 1911, for 8,500 shares of the capital stock of the Distilling Company, a corporation organized under the laws of the State of West Virginia, with a capital of two million dollars, one million dollars being preferred stock and one million dollars common stock; that the Distilling Company began business shortly after April 14, 1911, and thereafter until December 31, 1918, was engaged in the business of distilling and selling whiskies; that it had never paid any dividends on its common stock; that January 1, 1918, it had on hand more than 14,000 barrels of whiskey, and was indebted for large sums of money on account of the purchase of the same; that because of a phenomenal advance in the price of whiskey in 1918 the company made a very large profit, so that by December, 1918, it had accumulated a surplus over its liabilities amounting to about one million dollars; that on or about November 1, 1918, steps were taken by defendant Wolf looking towards the winding up of the business and the sale of the property of the corporation: that the directors of the Distilling Company were

Joseph Wolf, L. S. Wolf, his wife, Genevieve L. Simons, a stenographer in the employ of said corporation, and the complainant, White; that the stock issued to L. S. Wolf and Simons belongs in fact to the defendant Joseph Wolf, and that these other stockholders have acted as his agents; that the complainant became convinced that Wolf was about to convert the assets of the company to his own use; that complainant, under advice of counsel and to protect these assets, had caused to be deposited, in his own name as treasurer of the corporation, with the Corn Exchange National Bank the sum of $50,000 belonging to the corporation, and that as treasurer he had taken possession of $100,000 in U. S. liberty bonds belonging to the company and also of a note for $50,000 issued by the Market Safety Deposit Co. of Chicago. All this property, the bill states, complainant brings into court and offers to turn over to a receiver when appointed.

By an amendment to the bill it is alleged that December 31, 1918, the Distilling company wholly ceased to do business except in collecting certain accounts and notes; that the books of account were closed as of December 31, 1918, and that the company ceased to pay salaries; that the office and place of business formerly occupied by the company has been occupied by Joseph Wolf individually; that Wolf has taken out a Government license as a liquor dealer; that the company notified the U. S. Government that on and after January 1, 1919, it would and did cease transacting business under its license; that Wolf has caused the stationery used by the company to be marked "Joseph Wolf, Successor to James E. Pepper Distilling Company;" that the stock in trade of the company was taken possession of by Wolf on January 1, 1919, and that he is selling the same and converting the proceeds to his individual use and benefit.

The bill prayed that a receiver might be appointed for the corporation; that the assets should be marshalled and distributed among creditors and stockholders; that Wolf should be required to account for all property belonging to the company that had come into

his possession and been sold by him, and for all moneys drawn from the treasury of the company above the amount to which he was reasonably entitled, and that a certain resolution of November 27, 1918, ordering the issuance to said Wolf of a certificate for 74,095 shares of the common stock should be declared null and void and the certificate be delivered up by Wolf. Other relief was prayed.

To this bill of complaint defendants Adolph and Louise M. Wolf, Simons, and the James E. Pepper Distilling Company answered that the shares of the stock of the corporation standing in their respective names are and always have been the property of the defendant Joseph Wolf, and that they have no interest therein; that they believe that the 3,501 shares standing in the name of Alexander White of record on the books of the corporation have always been the sole property of Joseph Wolf, and that White never had any interest in them.

Joseph Wolf answered, denying in detail alleged relations with White as to an interest in and management of the corporation, and averring that he, Wolf, had at all times been the sole owner of all the stock not only of the James E. Pepper Distilling Company, but of its predecessor, the James E. Pepper Distributing Company, and denying that complainant was entitled to any relief prayed for. Afterwards Joseph Wolff filed a cross-bill, in which he set up the proceedings theretofore had in the cause, and averred that he, not White, was the owner of the certificate of stock in the Distilling company claimed by White, and averred that the same had been taken from his possession by White while he, Wolf, was absent from the city and at the same time that the property of the Distilling company was taken; averred that White was insolvent and financially irresponsible, and prayed that he might be restrained from disposing of the stock or property and barred from claiming any title therein, and that he, Wolf, might be decreed to be the owner.

The James E. Pepper Distilling Company at the same time filed a cross-bill in which it also averred that Joseph Wolf was the owner of the stock in controversy, and that the certificate for the same had been taken by White at the same time he took the property of the company, in the absence of Wolf from the city, and for the purpose of terrorizing Wolf into paying him some money or other consideration for the return of the property. It also prayed an injunction.

A demurrer of the complainant to the cross-bill of Joseph Wolf having been sustained, he afterwards filed an amendment in which he set up specifically the manner in which he claimed to have become the owner of the 3,500 shares of stock standing in White's name of record. His averments are to the effect that on or about August 2, 1901, he caused to be organized the James E. Pepper Distributing Company, with a capital stock of $10,000, divided into 100 shares of $100 each; that he requested White to subscribe for 96 shares of said stock as his agent, and caused the remaining four shares to be subscribed by others, all for his own benefit; that White so subscribed; that he never paid or gave any consideration for the stock or any part of it, but that he, Wolf, paid in full for the same to the Distributing Company; that a certificate or certificates were issued in the name of White for said 96 shares, and were then and there endorsed by White and delivered to Wolf as his sole property, and have always since been in his possession and control; that on or about July 28, 1908, he, Joseph Wolf, caused to be organized the James E. Pepper Distilling Company, as set forth in the bill, and that April 14, 1911, he decided to turn the business of the Distributing Company over to the Distilling Company; that thereupon the Distilling Company purchased the assets of the Distributing Company and in payment for the same issued to the Distributing Company one certificate for 25,000 shares of the common

stock of the Distilling Company; that he thereafter caused 25,000 shares to be re-issued and transferred 7,750 to Adolph Wolf, 3,000 to L. E. Wolf, 250 to W. G. Dunlap, 500 shares to himself and 8,500 to Alexander White; that White never paid any consideration either for the 96 shares of stock in the Distributing Company or the 8,500 of the stock of the Distilling Company, but that said 8,500 shares were when issued and thereafter the property of Wolf; that on the day said certificate for 8,500 shares was issued to White, he, White, endorsed and delivered it to Joseph Wolf as Wolf's sole property; that said certificate was ever since such delivery in the exclusive possession of Joseph Wolf until it was fraudulently taken therefrom by White in March, 1910, during Wolf's absence from Chicago.

To this amended cross-bill White answered, averring that he was the owner of the certificate for 8,500 shares of the stock of the Distilling Company and had been such owner since April 14, 1911. He admits the organization of the Distributing Company on August 2, 1901, with a capital stock of $10,000, divided into 100 shares of $100 each; admits that he subscribed for 96 shares of said stock, but denies that his subscription was for the benefit of Wolf. He avers that he subscribed over 34 per cent of the stock of the corporation for his own benefit, and that the remainder of the subscription was for the benefit of Wolf; he denies that Wolf paid in full for the capital stock of the Distributing Company and avers that he, White, paid the corporation for the 34 per cent of said stock, and that no part of the payment for said 34 per cent of stock was furnished by Joseph Wolf; denies that he ever endorsed any certificate evidencing this 34 per cent of stock of the Distributing Company to Wolf, or that at the time of its issue it belonged to Wolf or was at any time owned by him, but that on the contrary it belonged to and was the

property of White until it was exchanged for an interest in the James E. Pepper Distilling Company, thereafter organized.

The answer admits that the James E. Pepper Distilling Company purchased the assets of the James E. Pepper Distributing Company; that there was issued one certificate for 25,000 shares of the common stock of the Distilling Co. to the Distributing Co.; that these 25,000 shares were issued to various other persons, 8,500 of the same being issued to White; denies that this certificate was ever the property of Wolf or that when it was issued he endorsed and delivered the certificate to Wolf as Wolf's sole property, or that the certificate has been since such delivery in the possession of Wolf; denies that he, White, took the same, but avers that on the contrary he paid for the 8,500 shares of stock of the Distilling Company out of his own assets; that the certificate was issued to him for his own benefit, and was then and ever since has been his sole property; denies that he ever endorsed or delivered the certificate to Wolf or took the certificate from the possession of Wolf, but says the certificate has been from the time of its issue until now in his, White's, sole possession.

White admits taking $50,000 in cash, $100,000 in Liberty bonds and the note for $50,000, but avers that he did so under advice of counsel to protect the assets of the company, after he became convinced that Wolf had taken possession of approximately $428,000 of the assets of the Distilling Company with intent to convert the same to his own use; avers that he is solvent and financially responsible, and denies the cross-complainant is entitled to relief.

Replications were filed and the cause came on to be heard in open court. The decree entered expressly finds that the allegations of the cross-bill have been duly established by the proof; that the certificate of stock bearing date April 14, 1911, No. c 4, for 8,500 shares of the capital stock of the James E.

role

Pepper Distilling Company was caused to be issued by Wolf for his own use and benefit, and not for the use and benefit of White; that upon the issuance of the certificate it was duly endorsed by White and immediately by him delivered to Wolf as his sole and absolute property and thereafter remained in the possession of Wolf until fraudulently taken therefrom by White; that late in 1918 or early in 1919 White conceived the idea of fraudulently claiming to own this certificate for 8,500 shares, in order to defraud Wolf, and he thereupon fraudulently obtained possession of the said certificate, erased or caused to be erased those parts of the endorsement on the back of the certificate, appearing in lead pencil writing, which parts, including the name of Joseph Wolf, had been written thereon when said certificate was delivered by White to Wolf; that the certificate since it was issued has been at all times and now is the sole and absolute property of Wolf.

The decree further finds that the money, bonds and notes were taken by White as a means of enforcing his fraudulent claim to the 8,500 shares of stock which it decrees is the property of Joseph Wolf, and directs White to deliver the same to him; that the other property taken belongs in part to the James E. Pepper Distilling Company, and as to other parts is the property of Joseph Wolf, and orders the same returned to the respective owners.

It is apparent the controlling question in the case is whether the findings of the Chancellor with reference to the ownership of the 8,500 shares of the capital stock of the James E.Pepper Distilling Company is sustained by the evidence. If White was not such owner, then clearly he has no standing in a court of equity. A preliminary question, however, is raised by the contention of the appellant, that even assuming there was an agreement by which White was to hold the stock in the first Distributing Company for the benefit of Joseph Wolf, nevertheless the evidence shows that that agreement was made for the purpose of hindering, delaying and

defrauding the creditors of Joseph Wolf and that Wolf might evade his public and private obligations as a stockholder, and for that reason the cross-bill of Joseph Wolf and the cross-bill of the Distilling Company should each be dismissed for want of equity. We have carefully examined the evidence bearing on this point. The decree does not make any finding in this respect nor does it appear the complainant made any request for such finding. That Joseph Wolf was at this time heavily in debt, and that for many years unpaid judgments were outstanding against him is established. It does not appear, however, that this question was specifically raised by the pleadings. The cross-bill of Joseph Wolf alleged that the stock was put in the name of Alexander White for Wolf's convenience, and the answer of White to the cross-bill denied that it had been put in White's name for this purpose; but this would not, we think, raise the specific question which counsel now argue.

Without question it is the law that a court of equity will refuse its aid to compel the performance of a contract the purpose of which is to defraud creditors. But we think this rule cannot be applied to the facts of this case because the issue was not raised under the pleadings; and this was, we think, a condition precedent to raising the question in this court. Dorman v. Dorman, 187 Ill. 154; Wilson v. Wilson, 268 Ill. 270; Bachmeits v. Leichtweis, 256 Ill. 357. Appellant concedes that such is the general rule, but contends that there is a well settled exception to it, viz, that where it appears from evidence pertinent and material to the issues that a complainant has been guilty of iniquity touching the cause of action on which he sues, equity will give him no relief, even though the existence of such iniquity is not asserted in the pleadings. In support of this contention appellant cites Wright v. Dudley, 168 Ill. 86; Critchfield v. Barnudez, 174 Ill.

466; Osannyon v. Arms Co., 103 U. S. 261, and many similar cases from this and other jurisdictions.

The principle which appellant seeks to invoke is not a new one. It is based on the maxim ex turpi causa non oritur actio; an illegal contract will not support an action, and where the enforcement of such action is contrary to positive statute, against good morals or public policy, or where its enforcement would destroy the dignity of the court, the court itself, not in the interest of either litigant, but in conformity with its duty to the public and the state, will raise the question irrespective of the pleadings, and refuse the aid of the courts to either party. But we do not think the record here calls for the application of this exception. Even if the undisputed evidence tended to show, as appellant claims, that Wolf caused the stock in these various companies to be placed in the name of White for the purpose of putting the property beyond the reach of Wolf's creditors, that fact would not, we think, be controlling; but the evidence on this point is not undisputed. There is some evidence tending to show the contrary, and we cannot assume that if the issue had been raised by the pleadings and tried out, other evidence tending to show a different motive on Wolf's part might not have been submitted.

But, again, the cross-bill of Joseph Wolf is not based on the contract between himself and Alexander White. The evidence for Wolf tended to show and the decree finds as a fact that Wolf's cause of action against White arises out of the illegal and unlawful conversion by White of stock which is in equity the property of Wolf and of which Wolf had possession. If the facts as found by the decree are taken as true, White was undoubtedly guilty of an unlawful conversion of Wolf's property. The original contract between White and Wolf with reference to the stock is, therefore, not directly involved in the issues raised by the cross-bill, but is,

149; Oscanyan v. Arms Co., 103 U. S. 261, and many similar cases from this and other jurisdictions.

The generally well recognized exception to the rule is well settled. It is based on the maxim ex turpi causa non oritur actio; an illegal contract will not support an action, and where the enforcement of such action is contrary to positive statute, against good morals or public policy, or where its enforcement would destroy the dignity of the court, the court itself, not in the interest of either litigant, but in conformity with its duty to the public and the state, will raise the question irrespective of the pleadings, and refuse the aid of the courts to either party. But we do not think the record here calls for the application of this exception. Even if the undisputed evidence tended to show, as appellant claims, that Wolf caused the title of these various properties to be placed in the name of White for the purpose of putting the property beyond the reach of Wolf's creditors, that fact would not, we think, be controlling; but the evidence on this point is not undisputed. There is some evidence tending to show the contrary, and we cannot assume that if the issue had been raised by the pleadings and tried out, other evidence tending to show a different state of facts might not have been available.

Nor, again, the contention of [illegible] that Wolf is not bound of the contract between [illegible] and White. The evidence [illegible] in [illegible] and the [illegible] White [illegible] each of action against White [illegible] way of the illegal and [illegible] by Wolf at [illegible] which it is equally the property of Wolf and of which White had possession. If the facts as found by the lower court are true, White was [illegible] in [illegible] of Wolf's creditors, the illegal contract between White and Wolf with reference to the title is, therefore, not directly involved in the issues raised by the pleadings, but is,

on the contrary, a collateral matter.

If the evidence submitted on behalf of Wolf is to be believed (and it is apparent the trial court believed it) the stock had already been assigned to Wolf and the certificate representing it delivered to him. This conveyed at least the equitable title, although the legal title still stood in White's name. Wolf, therefore, does not need, as against White, the aid of a chancery court to perfect his title.

Again, the rule of law which appellant invokes is applicable only to the particular transaction which is under consideration. This is necessarily so. The application of the maxim of equity that he who comes into its courts must come with clean hands is necessarily limited to the consideration of the particular transaction involved, and not merely collateral matters.

The line must be drawn somewhere. Litigants are not denied relief in equity because of some general line of conduct which the equity court does not approve. This is not a suit where Wolf invokes the aid of the court to have the stock in question transferred to him on the books of the company. On the contrary he averred and the court found that the stock had been wrongfully taken from him and it directed that the possession should be returned. The cases of Springfield Homestead Association v. Noll, 137 Ill. 305, and Halleran v. Halleran, 137 Ill., 100, relied on by appellee, are, we think, directly in point and conclusive against appellant's contention. See also City of Chicago v. Union Stock Yards, 164 Ill., 224; Stillwell v. Stillwell, 47 N. J. Eq. 275; Lushka v. Kaizredel, 147 N. W. 331.

Appellant makes the further preliminary contention that, again assuming there was a contract between White and Wolf by which White was to purchase the stock in question for Wolf's benefit, nevertheless the arrangement was such that it would be unconscionable to require White, after a lapse of eighteen years, to carry out the

contract; citing Stubbings v. Barnes, 110 Ill. 843; Quillick v. Thatcher, 34 Fed. 436; Tuna Mfg. Co. v. Gormally, 144 U. S. 224.

The rule that a court of equity will never use its extraordinary powers to compel the carrying out of a contract which is unconscionable or oppressive is well settled. Appellant points out the liabilities which, under the laws of this State, White assumed as record owner of the stock for eighteen years, and assuming that he was not the lawful owner, appellant says it would be very unfair to compel him now to carry out the provisions of such an absurd agreement. Here, again, a sufficient answer must be that Joseph Wolf's cross-bill does not seek the aid of the court in that respect. It is not based on the theory that he is entitled to the specific performance of any such agreement; on the contrary, the gist of his action, as we have already said, is the alleged unlawful conversion by White of Wolf's property.

If the facts as found by the court are true, White was guilty of that conversion and a gross betrayal of a trust confided in him. No case is cited, and we think none can be found, where a court of equity has denied to the demanding party the relief to which he is otherwise entitled in such a case, for such a reason. The evidence does not show that White has ever lost a dollar or sustained legal damage because of his ownership of record of the stock. We think this contention also is without merit.

The controlling question of the case is, therefore, whether the findings of the decree as to the facts are justified under the evidence. If White was, as he alleges, the owner of the certificate of stock which stood in his name, for a valuable consideration, and had it in his possession, as he testifies, then the decree that dismissed his bill for want of equity was clearly erroneous. If he was not the owner of it, and had fraudulently taken the possession from Wolf, then his bill was properly dismissed and he has no standing to complain of alleged errors as to the re-

lief which the decree grants on the cross-bill. The chancellor saw the witnesses, some forty of them, and heard these witnesses testify at length. We cannot disregard the obvious advantages of the trial court in weighing the evidence. We think, however, that upon the production by White of the certificate of stock, the burden shifted to Wolf to establish, with reference to that stock, the allegations of his answer and cross-bill by a preponderance of the evidence. The chancellor found that such facts were established. The question for this court is whether the decree of the chancellor is clearly and palpably erroneous. A mere doubt is not sufficient to cause a reversal. Merry v. Herzfeld, 264 Ill. 84.

The importance of the decision in this case to each of the parties has not been overlooked, and while we shall not be able, on account of the voluminous record before us, to discuss the testimony of the witnesses in detail, we have given it very careful consideration, and will indicate the controlling reasons which have compelled the conclusion at which we have arrived.

In appellant's favor there is the uncontradicted fact that in the first and second Distributing Companies and in the Distilling Company he has for eighteen years been the owner of record of the stock which he now claims and which is represented by the certificate which he produces. He has this certificate in his possession, and the records of the different corporations show that he has participated in the meetings of the stockholders, and has at all times been recognized in these meetings as the legal owner and holder of the stock. There is also in his favor the further fact that it seems to be conceded that up to the time of charges made in connection with his alleged conversion of the certificate, his reputation for industry and honesty among his associates has been good. As to his ownership of the stock he is further corroborated by the testimony of a man, who says that some two years prior to the suit

he visited the safety deposit box of the complainant and there saw the certificate in the same condition that it now is; by the testimony of another man who says that at Joseph Wolf's request he visited the distillery at Lexington, Ky.; that Joseph Wolf then spoke of the prosperity which had come to the company by reason of the increased price of its goods, and stated that the effect of it would be to make the complainant wealthy. He is also corroborated by the testimony of Dr. Allport to the effect that at one time when White was ill, Joseph Wolf told the witness that White was a valuable man to him and that he, White, had an interest in the business. The record also indicates a circumstance which is much in complainant's favor - that one of the attorneys for Joseph Wolf attempted to intimidate this witness in regard to his testimony.

The complainant also testifies to the payment by him of a valuable consideration for the original shares of stock in the First Distributing Company which stood in his name. He says that he paid to Wolf therefor $700, and that the agreement between himself and Wolf was that the balance of the amount up to the sum of $2,500 should be paid out of the profits of the company. He testifies that this payment was made by a check which he obtained from his brother-in-law, who is now dead. He was not able, on cross-examination, to give the name of the bank on which the check was drawn. He says that he received the check from his brother-in-law in payment of his interest in a business in which they had been engaged together. An additional abstract has been filed, in which the cross-examination of complainant with reference to this payment appears. We are not impressed with the truthfulness of this account as related by him. He seems to have an utter lack of recollection as to the circumstances either of the payment of the money, the organization of the corporation or the sources from which the money was secured by him, which leads us to the conclusion that the chancellor may have been justified in disbelieving

his testimony, although it must also be admitted that Wolf's memory as to the circumstances under which the first Distributing Company was organized likewise appears to be unreliable.

But there are undisputed facts in the record which very much tend to discredit complainant's testimony. If we assume that this stock in the first Distributing Company was in fact owned by White, then Wolf had no stock in that company, Levy, Simons and others being the owners of it; and that conclusion would be wholly inconsistent with the actions of all the parties, since Wolf organized the company. White says that he bought his stock from Wolf, and it is clear that Wolf at all times dominated, directed and controlled the corporation's affairs. While White was the owner of record of the stock, Wolf at all times, with the knowledge of White, acted as if he, Wolf, was the real owner, and White acquiesced in such control by Wolf. Wolf paid the expenses connected with the organization, directed what bills should be paid, what contracts should be made, caused checks to be drawn whenever he pleased, directed who should be employed or discharged, made investments as to him seemed best, hired counsel to dissolve the one corporation and organize the other, disposed of their properties, had stationery printed naming himself as the successor of the Distilling Co., and had his name put on the door as its successor. White drew the checks for the expenses of these proceedings, participated in meetings at which the plans were made, and without a word of protest or even a suggestion that he ought to receive any part of these assets until, in the absence of Wolf, he suddenly seized $200,000 worth of assets of the company and employed counsel to make a written demand for his alleged rights. Reasonable men (owners) do not act that way. When pressed by court and counsel for a reason for this inaction, White replied that if he had made a demand on Wolf, he would have been thrown out - a significant admission.

White testified that when the first Distributing

Company was wound up, Levy was given $2,700 in cash for his interest and Simons $2,700 in whiskey; that the cash was paid from the funds of the second Distributing Company with White's knowledge; that he never objected to such a misuse of the funds of the corporation, a great part of the stock of which, we are now asked to believe, he actually owned. From December 31, 1908, to December 31, 1918, White drew in salary from these different companies the sum of $47,458.30. Wolf in the same time drew $539,535.43, not for his personal expenses, to be sure, but for these and other expenses which were incurred by the company at his direction.

That the certificate C 4 for 8500 shares of the James E. Pepper Distilling Company was in fact endorsed and delivered to Wolf, as many witnesses testify, is, we think, rather conclusively established by the testimony of Alexander C. Barclay, who made out a list of the stockholders of the corporation in 1915. This list is in evidence. The notations of Barclay correspond with the notations on the stubs of the certificates rather than with the certificates themselves, and from this appellant draws the inference that Barclay's testimony to the effect that the certificates were produced by White at that time, which White denies, should not be believed. While there is some doubt on that point, the list prepared and in evidence shows without doubt that at that time (more than three years prior to the beginning of this suit) the certificate standing in White's name had been endorsed to Wolf. That fact, which we regard as settled beyond reasonable doubt, is not only inconsistent with the claims now made by White, but disposes of the contention of counsel that Wolf's claim to ownership of the certificate has been invented for the occasion.

Significant too, is the testimony of John H. Knapp, now a truck farmer in Florida, but who in 1914 was a reporter for

the Credit Guide Co., a commercial agency in Chicago. This witness was in 1914 requested by his employer to make a report on Joseph Wolf. He visited the offices of the James E. Pepper Distilling Company for that purpose and in the absence of Wolf was referred to White, whom he interviewed. He testifies (and is corroborated by the written record made by him to his agency at that time) that White told him Wolf was the sole owner of the Distilling Company, and was financially responsible to the extent of $400,000. Significant also is the fact that after the issue of 8,500 shares to White on the 14th day of August, 1911, a single share was issued to him on the following day. White does not claim any rights under this share; he admits that it belongs to Wolf. If the testimony of Goodman, the attorney who organized the company, is true, that the certificate for the 8,500 shares issued in White's name was at once endorsed by White and returned to Wolf, then it would be reasonable to suppose that this one extra share was on the following day issued to White, in order that he might be qualified to act as an officer and director of the company. There is no other reasonable explanation as to why this one extra share should have been issued to White.

But the controlling circumstance is the conduct of White with reference to the winding up of the affairs of the Distilling Company. He had full knowledge of the proposed dissolution as early as December, 1913. He wrote letters asking for proxies, in order that the dissolution might be put into effect. He furnished the attorney for Joseph Wolf with data from which the necessary minutes to that end were drawn. He signed some resolutions as an officer of the company. He executed a certificate issuing 74,995 shares of the new stock of the Distilling Company to Wolf. He signed a resolution authorizing the sale at auction of all the whiskey belonging to the company. He knew that Wolf was to buy it, but never inquired what he was to pay for it.

December 28, 1918, Wolf obtained from the company 4,385 barrels of whiskey, which at the market price were worth $38,500, for which he, Wolf, did not pay a cent, and against which White did not protest or even make an inquiry about it.

White arranged to have the stationery used and the sign on the door changed to read "Joseph Wolf, Successor to James E. Pepper Distilling Co.," opened a new set of books in that name and assisted in procuring a new license in that name, drew checks in Wolf's name, and endorsed over to Wolf checks given in payment for whiskey which had been sold by the Distilling Company, drew other checks for the express purpose of paying for the securities with the company's money. When asked by the court why he did not speak to Wolf about his rights prior to Wolf's trip to Hot Springs, White answered, "Well, I did not think, I did not know why; I thought the man would act that way probably, would kick me right out, and I would have no chance to do anything."

White's own testimony, together with the written evidence in the case, makes it impossible for us to say that the chancellor was clearly and palpably wrong. We have not discussed many phases of the evidence argued at length as to the finding of the private box of Joseph Wolf upon his return from Arkansas, nor the charge that there had been erased from the certificate of stock the name of Joseph Wolf, which several witnesses said had been endorsed thereon in lead pencil. It is the contention of the appellee that this endorsement was removed by White. The defendant's testimony on this point is contradicted, is in some respects improbable, and leaves us in doubt.

That point, however, is not necessary to our decision. The controlling facts could scarcely be said to be in dispute. Witness after witness testifies to statements made by White wholly inconsistent with his ownership of an interest in the corporation.

These declarations against interest would be entitled to little weight if uncontradicted facts and circumstances did not corroborate them. We are satisfied from all the evidence that the certificate in the Distilling company at the time it was issued was endorsed by White and delivered to Wolf, and that it remained in Wolf's possession until in some way (just how we do not think it necessary to decide) White took advantage of the confidential relationship in which he stood and took possession of it for his own purposes. The endorsement of the certificate, which was in the usual form and in blank by White, and its delivery to Wolf, passed the equitable title to Wolf, without a transfer on the books. This is the rule even where the by-laws provide otherwise. McCarthy v. Crawford, 238 Ill. 38. As White had no interest in the certificate, he has no standing to maintain his bill. As the bill was properly dismissed, he has no standing to complain of the relief granted to cross-complainants on their cross-bill.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

311 - 27269

FRANCIS W. McNAMARA,
Appellee,

vs.

LONDON GUARANTEE & ACCIDENT COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree in favor of the complainant on an amended bill as amended, which prayed that certain contracts should be so reformed as to express the intention of the parties, and for an accounting with the defendant under such contracts. The decree directed that the contracts should be reformed, and finds that there is due to complainant the sum of $9074.83 with interest at the rate of five per cent per annum from May 1, 1913, - a total sum of $12,534.17. The case was heard by the chancellor upon exceptions of the defendant to the report of the master to whom it had theretofore been referred. These exceptions were all over-ruled and the decree adopts the findings and conclusions of the master.

The appellant's exceptions were more than 100 in number and many of these are discussed in its argument. There is, however, little dispute in the record as to the material facts.

The complainant is a licensed physician and surgeon, who has practiced his profession for more than twenty years last past; the defendant is a corporation of London, England, having a branch office at Chicago, Illinois, where it has for many years engaged in the business of writing liability and indemnity insurance for its various customers in consideration of certain premiums paid to it.

In April, 1912, one H. M. McConnell was the superintendent of defendant's claim department. Defendant opened negotiations with the complainant looking toward his employment to render medical and

surgical services as might be needed by the employees of certain of its assured, for whom defendant had written liability insurance in connection with certain work in the way of building construction, which the assured were about to undertake. In doing this work these assured employed large numbers of laborers, and were engaged in work which would bring the assured within the provisions of the Workmen's Compensation Act, which was to go into effect on May 1, 1912. Under the terms of that act the assured were liable to pay to injured workmen certain benefits and compensation, against which the policies written by defendant contracted to indemnify.

McConnell prepared and submitted to complainant a written "surgeon's contract," so-called, and stated to complainant that if the form was satisfactory he, McConnell, would have a number of them printed for use in making contracts for the different jobs upon which the defendant had written insurance. This form of contract was approved by the complainant, and a number of contracts, substantially similar as to form and provisions, were executed. While the contracts seem to have been dated May 1, 1912, the first one was submitted by the defendant to the complainant in a letter dated May 17, 1912, which stated:

> "In re Leonard Construction Company.
> I am enclosing you herewith Surgeon's Contract covering full medical aid and hospital attention for employees of above risk. Kindly sign the same and return to me promptly.
> Yours very truly
> London Guarantee & Accident Co. Ltd.
> By M. M. McConnell,
> Superintendent Claim Department."

This contract recites that it is a "Memorandum of agreement made and entered into *** by and between the Leonard Construction Co. not inc., party of the first part, and Dr. Francis W. McNamara, party of the second part." It recites that in consideration of his appointment as surgeon for said company at Chicago and for compensation mentioned, he agrees to render in person or by

competent substitute, all necessary medical and surgical attendance and hospital attendance in each and every case of personal injury to which he may be called and which shall occur to any employee of the Leonard Construction Company. The "party of the first part" agrees to pay the "party of the second part" in full for any and all services so rendered as aforesaid, and in full for all disbursements and expenses, "a fee amounting to 12½% of the premium rate by said party of the first part for insurance paying benefits under the Illinois Workmen's Compensation Act, said premium being based upon the compensation earned by all the employees covered by said insurance," excluding, however, executive officers and main office force; that payment of the amount shall be made quarterly during the life of the agreement; that if the party of the second part or any substitute or substitutes appointed by him shall not be able, because unavailable or otherwise, to attend any cases of personal injury when called upon, the party of the first part shall thereupon call in a competent surgeon to attend to the case, and shall be entitled to charge a reasonable fee for such surgeon to the party of the second part and deduct the same from any amount due him. Further, that the agreement shall continue in force from May 1, 1912, to May 1, 1913, except that it may be cancelled by either party upon ten days written notice. The contract is executed, "Leonard Construction Company, Employer, by London Guarantee & Accident Co. Ltd., per H. M. McConnell, supt. claim dept. O. K. H. M. McConnell, accepted, Francis W. McNamara."

With a single exception all of the contracts made were to go into effect as of May 1, 1912, although executed at a later date. The uncontradicted evidence shows that at and prior to the time of executing these contracts, McConnell stated to McNamara that the defendant had authority to execute the same in the name of the assured, and the evidence also tends to show that McConnell and McNamara believed that this was in fact true. Immediately after the

execution of the contracts Dr. McNamara entered upon his duties. At the direction of McConnell he gave the assured his telephone number and address. In many cases the assured gave a card to injured employees, indicating that they were entitled to the services of Dr. McNamara. Of the injured employees of the Leonard Construction Company alone Dr. McNamara treated 116 different persons in the course of his duties, giving some 700 different treatments.

August 17, 1912, defendant sent to Dr. McNamara a check for $400, with the following letter:

> "Leonard Construction Company
> We enclose herewith our check No. L21950 to your order for $400 in payment of salary on account of contract from May 1st, 1912, in connection with Illinois Central, Larkin and Franklin jobs."

October 3, 1912, the defendant sent to complainant a second check for the sum of $440.25, with the following letter:

> "Enclosed you will find our check No. L-33647, to your order for $440.25 in payment of salary as per contract for surgical services rendered injured employees of the above assured."

By the insurance policies which defendant issued to these assured, the defendant agreed not only to pay compensation to the injured employees as required by the Compensation act, but also to furnish all such medical services to any person or persons to whom compensation or service should be due. These policies, however, did not give to the defendant any authority to contract for such services in the name of the assured. These assured did not take any part in making the contract with Dr. McNamara, and were never consulted with reference to the making of the same.

Although there was some contradiction in the evidence, the master found, and we think his finding is justified by the evidence, that Dr. McNamara never refused to treat any employee who had been sent to him by the defendant corporation or by any of the parties whose injured employees he had contracted to treat.

October 1, 1912, McConnell resigned as superintendent of the defendant's claim department, and severed his connection with the company. He was succeeded by M. C. Ryan, and after Ryan assumed the direction of affairs for the Insurance company no further business was sent to Dr. McNamara. Between May 1, 1912, and May 1, 1913, the defendant company received on account of policies which it had issued to these parties, with reference to whose employees these contracts with Dr. McNamara had been made, premiums to the amount of $83,262.32. Many cases were from time to time sent to Dr. McNamara, the last of such cases that he treated being in December, 1912.

Assuming that the contracts were properly reformed, and that defendant is liable to account thereunder, it is not disputed that there is a balance due of $9074.33.

We think that the facts above set forth are sustained by an overwhelming preponderance of the evidence; indeed that there cannot be said to be doubt with reference to them.

Appellant has argued that the finding of the master to the effect that the defendant was to furnish medical services is not sustained by the evidence. But we think a careful reading of the insurance policies shows that this contention cannot be sustained, for the reason that the policies expressly provide that defendant shall indemnify the assured from all liability imposed by law for compensation for personal injuries suffered by employees of the assured under the Workmen's Compensation Act, and under that act medical and surgical aid is one of the liabilities of the employer which the defendant company assumed and agreed to pay.

Moreover, defendant's own construction of the policies is against its present contention, for it actually assumed and paid for such services in so far as the same have been paid for. We think it is bound by its own construction of its legal liability to the assured under the policies.

Appellant next argues that it was error for the court to refuse to strike the contracts from the evidence, because the same were not made with the authority of the assured. Assuming the contracts, without such proof, were not admissible under the theory upon which the bill was originally drawn, nevertheless complainant obtained leave to amend his bill so as to make it conform to the proof, and it is not urged and cannot be successfully, that under the bill as amended the contracts were inadmissible. This contention is without merit.

Appellant again argues strenuously that oral evidence of conversations between McConnell and complainant prior to the execution of the various contracts was inadmissible to vary the terms thereof, and cites Town of Kane v. Farrelly, 192 Ill. 588, to that effect. That case lays down the well known rule of law as to the non-admissibility of oral evidence to vary the terms of a written contract, but that rule, necessarily, cannot be applied in chancery upon a bill brought to reform a contract. To so hold would be to make such relief impossible. In lieu thereof equity requires a high degree of proof before its extraordinary power will be exercised, in order that fraud and perjury may not be successfully used. Kelly v. Trumble, 74 Ill. 428; Koch v. Streuter, 218 Ill., 546, 2 R. C. L. 365.

Appellant next contends that assuming such evidence was properly admitted, it is wholly insufficient to sustain the decree, or to show that there was any mistake as to who were the real parties to the contract, or to sustain the master's finding that the defendant company is the real party thereto. In this connection appellant points out that the complainant is an intelligent man, familiar with court and legal proceedings, having been an expert witness for many years; that he carefully examined the typewritten draft of the contract; that he read it over; that he determined whether the conditions of it were favorable to him; that

before the amendment to the bill, asking that the contracts should be reformed, he testified that his relations were with the assured, and that he was not doing business with any other corporation or outsiders; that he distinctly said that he acted under these contracts as made; that he had many conversations as to the work to be done by him for the assured under the insurance policies; that he distinctly said he was not working for them; that in his requests for settlement he clearly refers to the contracts as contracts with the assured, and bases his claim to compensation upon the theory that the defendant company has received from the assured the moneys out of which his compensation is to be paid.

Appellant also calls our attention to the allegations of the original bill, which was sworn to by the complainant, and which stated in effect that the defendant company agreed to collect the premiums for him, and was liable to him upon that account.

The supposed inconsistencies in the allegations of the original bill and the bill as amended were undoubtedly considered by the chancellor when overruling appellant's objections to the order giving leave to complainant to file this amendment. The allegations of the original bill were somewhat in the nature of conclusions, and we think it appears from a careful consideration of the whole proceeding that up to the time the amendment was filed the complainant had relied upon the information given to him by McConnell to the effect that the Insurance company had full authority from the assured corporations to make these contracts. When in the course of taking the evidence it became apparent for the first time that this was not true, and that McConnell (without actual intention to deceive so far as the record shows) had misrepresented the facts with reference to the authority of the Insurance company, complainant had a right to again consider the facts in view of this unexpected development. If the oral conversations

stood alone, there might be something of merit to appellant's contention that the evidence is insufficient; but the oral conversations, although uncontradicted, do not stand alone. They are corroborated by the contracts; they are corroborated by the policies issued by the defendant to the assured; they are corroborated by the letters written by defendant to Dr. McNamara, and, in fact, are corroborated by the whole course of dealing between the complainant and the defendant.

The controlling question in the case therefore is whether a court of equity has the power to decree the reformation of a contract under the circumstances disclosed by the evidence. Appellant says that it has not, for several reasons. First, it objects that the several parties in whose names the contracts were made are not joined as defendants, citing Hallman v. Schneider, 75 Ill. 422. But the decree finds that the defendant is the real party to each of these contracts, and if the finding is correct on that issue of fact, there is no merit to this contention. Certainly by the terms of the decree the assured are not obligated in any way, nor has the appellant any standing to assign errors for them.

Appellant also says that the master found the contracts were void and that the Supreme court has held that equity cannot give validity to a void contract; but appellant is mistaken in this respect. The master did not so find. He found that the defendant had no authority to execute these contracts in the name of the assured, and that the same were not contracts of the assured; but the decree also finds that the contracts are valid and are in fact binding on the defendant.

Appellant says that equity has no power to make a new contract; that it cannot create a contract between the parties which was not intended by either, or in the absence of fraud, accident or mistake, change such a contract. All of this is elementary.

stand alone, there might be something of merit in appellant's contention that the evidence is insufficient; but the said memoranda, although uncontradicted, do not stand alone. They are substantiated by the testimony; they are corroborated by the bulletin issued by the defendant to the council; they are corroborated by the letters written by defendant to Mr. [illegible], and, in fact, are corroborated by the whole course of dealing between the complainant and the defendant.

The controlling question in the case presented is whether a court of equity has the power to decree the reformation of a contract under the circumstances disclosed by the evidence. Appellant says that in his suit, the original [illegible]. [illegible] that the several parties to which the [illegible] were made are not joined as defendants, citing [illegible] v. [illegible], 76 Ill. 430. But the decree finds that the defendant is the real party to each of these contracts, and if the finding is correct as that issue of fact, there is no merit in this contention. [illegible] by the terms of the [illegible] the [illegible] was not [illegible] in any way, [illegible] the [illegible] the case.

[illegible] says that the [illegible] the [illegible] was [illegible] the [illegible] validity to a [illegible] [illegible] is [illegible] as [illegible] past. The [illegible] did not so find. He found that the [illegible] had no authority to execute those contracts in the name of the [illegible], and that the same were not contracts of the [illegible]; but the decree also finds that the contracts are valid and are in fact binding on the defendant.

[illegible] says that equity has no power to make a new contract; that it cannot create a contract between two parties which was not intended by either, or in the absence of fraud, make one by [illegible], change that a [illegible]. All of this is [illegible],

Appellee's case rests on the theory that there was a mutual mistake.

Appellant further contends that if there was a mistake in this case, it was a mistake of law and not of fact, and therefore furnishes no ground for the reformation of the contracts.

It is undoubtedly the general rule, subject to only a few exceptions, where it would seem special circumstances have controlled, that a court of equity will not intervene to correct a pure naked mistake of law, and such is the rule in Illinois. Bradwell v. Thompson, 8 Ill. 509; Galtra v. Bunsack, 53 Ill. 456; Tilton v. Fairmont Lodge, 244 Ill., 617; Holmes v. Yontin, 304 Ill. 579; Story's Equity Jurisprudence, 14th ed., secs. 304 and 305. On the other hand, it is undoubtedly the general rule that an act or a contract made under a mistake as to material facts will be relieved against in a court of equity. The reason for the first rule is that public policy will not permit that anyone should be excused on account of ignorance of the law, which all are presumed to know. The reason for the second rule is that no one can be presumed to be informed as to all the facts. Story's Eq. Juris., 14th ed. sec. 309.

> "A mistake of law occurs when a person having full knowledge of facts, comes to an erroneous conclusion as to their legal effect."

But

> "A mistake of fact takes place when some fact which really exists, is unknown, or some fact is supposed to exist which really does not exist."

Words and Phrases Judicially Defined, vol. 5, pp. 4542-43.

The undisputed proof in this record shows that complainant and McConnell, who represented the defendant in this transaction, both believed that the defendant had full authority to execute these different contracts in the names of the several assured. It does not appear, nor is it claimed by the complainant, that they were ignorant of any rule of law applicable to the situation. Presumptively the parties knew that if the contracts were executed without authority from the principals, the same would

be void and unenforceable; but, apparently, both believed that the defendant had authority to execute the contract. If we assume defendant knew it did not have such authority, then clearly it obtained complainant's services through a fraud, which a court of equity would not hesitate to relieve against. There is no evidence, however, that defendant's manager acted with a fraudulent purpose. The evidence, we think, establishes beyond doubt a mutual mistake of fact. It is true that there was no mistake of fact as to the choice of the actual words chosen to be inserted in the contract. But the words chosen and which named these different insured as parties to the contracts, were the result of this mutual mistake as to the authority of defendant in the matter. As a result of that mistake the contracts made utterly failed to express the real intention of the parties, which, as the master finds, was that the "London Guarantee and Accident Co. Ltd." and not the insured, should be the employer of McNamara, and should pay his fees, and that it should be the real party to the contracts. Since the mistake was one of fact, equity will look through the form to the substance, and put into effect the real intention of the parties.

But whether we are correct in this view of the matter, we are further disposed to hold that the decree should be affirmed on another ground. We think that under the proofs complainant could have recovered even without an amendment made to the bill. While it is true the assured would not be bound under these contracts, made without authority either in law or equity, nevertheless we think the defendant should not be permitted to here deny the validity of these contracts, in so far as the same affects its liability. We think defendant is bound by its representation of authority through which it obtained these contracts and the benefits of the services of Dr. McNamara. The record shows the inadequacy of the remedy at law, and equity having obtained jurisdiction will

see that justice is done between the parties, and since defendant has in its possession money which in good conscience belongs to the complainant, he is entitled to a decree.

But appellant again says that McConnell was without authority to enter into any of the contracts in behalf of defendant, and that therefore, assuming that the contracts have been properly reformed, the same are made without authority and therefore are not binding. We think his authority is established by the evidence, but if it is not, there is abundant evidence in the record that the officials of the corporation, with knowledge thereof, approved and ratified his actions.

Appellant further contends that it was error to allow interest upon the amount found due. Interest is in equity allowed because of equitable considerations, and we think, under all the circumstances of this case a refusal to allow interest would amount to a great injustice. Indeed, we think it might possibly be urged that defendant is liable under the statute because of "money withheld by an unreasonable and vexatious delay of payment." Keidy v. White, 168 Ill., 76.

We have given to all the numerous points raised by appellant due consideration. We are satisfied that the decree is just, indeed that any other would have amounted to a miscarriage of justice, and it is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

26 - 27450

FIRST NATIONAL BANK OF ALLEGAN, MICHIGAN, a corporation,
Defendant in Error,

vs.

FRANK M. McKEY, Trustee, PHILIP DRAY, PAUL WITKOWSKY, CENTRAL TRUST COMPANY OF ILLINOIS, Trustee,

PHILIP DRAY,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT
OF COOK COUNTY.

223 I.A. 615

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, The First National Bank of Allegan, Michigan, filed a bill in equity against Frank McKey, trustee of the estate of E. C. Lewis, a bankrupt, Central Trust Co., trustee, of Chicago Waste Paper Co., a bankrupt, Philip Dray and Paul Witkowsky, in which it prayed that it might be decreed to be the owner of three notes, dated October 15, 1918; that defendant Dray might be decreed to have no right or title to these notes, and that the transfer and delivery thereof to him should be held to be without consideration, and with full knowledge on his part of complainant's rights therein; that McKey should be enjoined from paying the proceeds thereof to Dray, and Dray from receiving such proceeds or transferring the notes. A preliminary injunction issued as prayed . The case was put at issue and referred to a master, who took the evidence and reported, and the cause was heard by the chancellor upon exceptions of Dray and Witkowsky to the master's report. These exceptions were overruled, and a decree entered in accordance with the prayer of the bill.

The facts as alleged in the bill, established by the evidence and found by the decree are that E. C. Lewis, trading as the Chicago Folding Box Co. became a defendant

in a bankruptcy proceeding; that the Chicago Waste Paper Co., which originally was conducted as a copartnership, composed of Witkowsky and one Grossman, but which at that time had become a corporation, filed a claim against the estate of Lewis in the sum of $4,843.42; that a composition was effected between Lewis and his creditors on October 18, 1918; that in conformity with the terms of the composition, Lewis executed and delivered to the Chicago Waste Paper Co., which in the meantime had become incorporated, notes representing the amount of this indebtedness; that these notes on the day of their execution were endorsed and delivered by the Waste Paper Co. to the defendant Dray; that the claim for $4,843.42 filed in the bankruptcy proceeding represented certain indebtednesses, for which Lewis had previously executed and delivered notes to the Chicago Waste Paper Co., and which notes had, by that company, been transferred and delivered to the complainant; that the claim filed with the referee in bankruptcy by the Waste Paper Co., stated that no notes had been given for the indebtedness; that McKey, as trustee, however, received written notice of defendant's rights with respect to this claim prior to the entry of the composition, and that he was requested by the complainant in writing to make the renewal notes payable to the complainant, and to deliver the same to the complainant; that each of the composition notes as executed, contained upon the face thereof the statement that it was secured by a trust deed to McKey, of even date, and would draw interest at the rate of six per cent after maturity, and further stated that it was "subject to the terms and conditions of a trust agreement between Elgin O. Lewis and Frank M. McKey trustee."

The decree finds, as a matter of law, that these composition notes were not negotiable, and, as a matter of fact, that in transferring the same, Witkowsky and Dray had full knowledge of the complainant's rights, and knew that the

composition notes were given in pursuance of the composition agreement for the indebtedness due from Lewis to the complainant; that Dray at the time of the filing of the bill of complaint and prior thereto was in fact insolvent; that McKee now has in his possession the full amount of the proceeds of the notes, amounting to $4,843.48, and is ready to pay the same to the lawful owner, and he is directed to pay the same to the complainant Bank; the temporary injunction is made permanent and Dray is ordered to surrender the notes to the clerk of the court within two days.

Appellant's first contention is one obviously without merit. It is that as the composition in bankruptcy had the effect of releasing complainant's claim as against Lewis, complainant has, therefore no standing in a court of equity to collect the proceeds of these notes. On what theory a release in the bankruptcy court could so operate as to prevent the holder of an indebtedness from enforcing a trust arising out of a fraudulent attempt to take from him the proceeds of the composition under which his indebtedness was released, we are not able to comprehend.

Moreover, we think the evidence justifies the finding of the decree that Dray took these notes with knowledge of complainant's rights and without consideration; but whatever our conclusion as to this issue of fact might be, we think that, as a matter of law, these composition notes were not negotiable, and that even if Dray had taken the same without actual notice and for a valuable consideration, he could not be held a holder in due course. Equitable Trust Co. v. Harger, 258 Ill. 615; Barton v. Hayden, 199 Ill. App. 37; Klot's Throwing Co. v. Manufacturer's Co., 30 L. R. A. N. S., 40.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

compensation notes were given in purchase of the compensation agreements for the indebtedness due from Lewis to the complainants; that Gray at the time of the filing of the bill of complaint and prior thereto was in fact insolvent; that Kohn was in the possession the full amount of the proceeds of the notes, amounting to $4,842.42, and is ready to pay the same to the lawful owner, and he is entitled to pay the same to the complainants; the temporary injunction is made permanent and Gray is enjoined to surrender the notes to the clerk of the court within ten days.

Appellant's first contention is one obviously without merit. It is that on the composition in bankruptcy had the effect of releasing complainant's claim or against Lewis, complainants has, therefore no standing in a court of equity to enforce the proceeds of those notes. On what theory a citizen in the bankruptcy court could be entitled to prevent the holder of an indebtedness from enforcing a trust arising out of a fraudulent attempt to take from him the proceeds of the composition under such his indebtedness was released, we are not able to comprehend.

However, we think the evidence justifies the finding of the course that Gray took those notes with knowledge of complainant's rights and without consideration; the minutes our conclusion on to this is no of fact right be, we think that, as a matter of law, that composition notes were not negotiable, and that even if Gray had taken the same without actual notice and for a valuable consideration, he could not be held a holder in due course. Louisville Trust Co. v. Hunter, 208 Ill. 618; Burton v. Burton, 241 Ill. 184; Kelly's Harness Co. v. Lewis-Hunter Co., 90 Ill. App. 82.

The order is affirmed.

AFFIRMED.

52 - 27515

PEOPLE ex rel. VINCENT MILAVICH,
Appellee,

vs.

WILLIAM HALE THOMPSON, Mayor of the City of Chicago, and AGE EYLSTRA, City Collector of the City of Chicago,
Appellants.

APPEAL TO CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On December 19, 1921, the appellee, Vincent Milavich, filed an amended petition in the Circuit Court of Cook County, in which he set up that he was the owner of certain premises therein described, situated in the City of Chicago and of the value of $10,000; that he had built a garage thereon at a cost of $25,000; that he was indebted on the building in the sum of $13,000; and that a bill to foreclose a mechanic's lien had been filed against the premises in which a receiver was asked; that he theretofore applied for a license to operate the garage; that on August 27, 1921, the license officer forwarded his application to the superintendent of police with the recommendation stating "I have investigated the within named, and find him to be a person of good character, and promises to comply with the laws and ordinances regulating public garages. Would recommend that license be granted. Not within 200 feet of church, school and hospital. Business street. Size 50 feet by 118 feet;" that on August 29th Captain Gallery, police superintendent, forwarded this application to the superintendent of police with this endorsement "For the foregoing reasons I recommend that license be granted;" that on September 1, 1921, the superintendent of police endorsed his approval upon the application, and forwarded the same to the office of the City collector, and that a license

$699 was thereupon issued, and the petitioner opened the garage; that on October 8, 1921, petitioner's license was revoked by the order of the Mayor of the City of Chicago "without any legal cause or justification." The petitioner says "Your petitioner further shows that he complied with all the legal requirements demanded by the ordinances of the City of Chicago to secure a license to operate a garage on his property, and that he was issued a license after such complete compliance with the laws and ordinances in force and effect in the City of Chicago covering the operation of a garage on his property, and particularly, your petitioner complied with the ordinance passed on June 29, 1917, entitled 'An ordinance amending an ordinance passed July 17, 1911, as published in the right hand column on page 932 of the Journal for the years 1911 and 1912 in regard to the location of garages,' in full force and effect on September 1, 1921, the date upon which said license to operate a garage at #2931 to 2933 Wentworth Avenue was issued to your petitioner."

The petition further alleges that the situation has not changed since September 1, 1921, when he was granted a license; that he has a clear legal right to a license; that he has been unable to learn the reason for the revocation of his license, and has visited the several departments of the City Government in an effort to secure the restoration of his license, unlawfully revoked on October 8, 1921, yet the Mayor and City Collector refuse to restore the license. The petition prays a writ of mandamus to the Mayor and City Collector.

To this petition a general demurrer was interposed, which the court overruled, and ordered the writ of mandamus to issue as prayed for.

Appellants argue that the petition is defective in that it fails to set up either in substance or otherwise, the ordinances of the City of Chicago with reference to the location of garages. We think this contention must be sustained. It is necessary for

[illegible] was challenged issued, and the petitioner against the writ; that on October 6, 1921, petitioner filmer was arrested by the order of the Mayor of the City of Chicago without any legal cause or justification. The petitioner says that petitioner further shows that he complied with all the legal requirements demanded by the ordinances of the City of Chicago in order to secure a license to sell a drugs on his property, and that he was issued a license after such complete compliance with the laws and ordinances in force and effect in the City of Chicago covering the operation of a drugs on his property, and particularly that petitioner complied with the ordinance passed on June 20, 1921, entitled "An ordinance [illegible] on October 1, 1921, as published in the [illegible] that before he was the holder of the license the [illegible] and 1921 in regard to the location of drugs," in full force and effect on September 1, 1921, the date upon which said license to operate a drugs on [illegible] be also "Whereas was issued to your petitioner."

The petition further alleges that the situation, but not changed since September 1, 1921, when he was granted a license; that in fact a more large right to a license; that he had been unable to learn the reason for the revocation of his license, and has violated the natural guarantees of the City Government in an effort to secure the revocation of his license, unlawfully revoked on October 2, 1921, yet the Mayor and City Attorney refuse to return the license. The petition prays a writ of mandamus be the Mayor and City Attorney.

The court petition a general demurrer was interposed, which the court overruled, and denied the writ of mandamus to issue as prayed for.

Counsel argue that the petition is defective in that it fails to allege either in substance or otherwise, the ordinance of the City of Chicago with reference to the location of drugs.

the pleader in such case to aver every material fact necessary to show that he is entitled to the relief demanded. Neither the Circuit Court of Cook County nor this court can take judicial notice of the provisions of ordinances of the City of Chicago, to which this pleading refers. The averments of the petition that petitioner has complied with all of the provisions of these ordinances is the mere conclusion of the pleader, which gives the court no information.

The relator seeks to distinguish between cases where a license has never been granted and cases such as this one, where the license has been revoked. There is no ground in reason upon which the cases can be so distinguished, and the law is so well settled as to make the discussion of these cases unnecessary. Appellee cites People ex rel. Kisselberg v. City of Chicago, 210 Ill. 479; People ex rel. King v. City of Chicago, 147 Ill. App. 591 and Stott v. City of Chicago, 205 Ill. 281, as authority for the proposition that "In a petition for a writ of mandamus seeking the restoration of a license, it is sufficient to set up the ordinance by reference." These cases carefully read, do not sustain the proposition as stated, but are contra.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Dover, J., concur.

190 - 27666

SAM ARADO,
Appellee,

vs.

THE WHITE CONSTRUCTION COMPANY, a corporation; and THE WHITE PAVING COMPANY, a corporation,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a case in which there was a trial by jury. At the close of all the evidence the defendants moved for a directed verdict, which was denied, and the jury returned a verdict against defendants for $175.53 "in tort." Motions for a new trial and arrest of judgment in behalf of defendants were overruled, and judgment was entered on the verdict.

The statement of claim alleged that on July 20, 1921, plaintiff was the owner of certain pieces and panes of glass, which were set in a certain building located on North Cicero avenue, in Chicago, Illinois; that the defendants were the owners and in possession of vehicles, which through its agents and employes, were used in hauling and transporting crushed stone, pebbles and gravel along North Cicero avenue, near the building in which the panes of glass had been placed, and that, disregarding its duty, it so carelessly and negligently transported these materials, that the same were dropped and allowed to fall upon the street; and that while the same were lying upon the street, a certain motor vehicle, equipped with pneumatic tires, operated along the street and over the said dropped material, and that these pneumatic tires flipped and flung the particles of material so lying upon the street against the glass, and split the glass, breaking the same.

MR. JUSTICE BARNETT DELIVERED THE OPINION OF THE COURT.

This is a case in which there was a trial by jury, at the close of all the evidence the defendants moved for a directed verdict, which was denied, and the jury returned a verdict against defendants for $25,000 in favor of plaintiffs for, upon trial and appeal of judgment in behalf of defendants, were overruled, and judgment was entered on the verdict.

The statement of claim alleged that on July 30, 1944, plaintiff was the owner of certain gloves and pairs of gloves, which were set in a certain building located on North Clarke avenue, in Chicago, Illinois; that the defendants were the owners and in possession of building, which should the plaintiff and employees, were used in loading and transporting crushed stone, pebbles and gravel plant, South of Cora avenue, near the building in which the power of plaintiff had been placed, and that, disregarding its duty, it so carelessly and negligently transported these materials, that the rocks were dropped and allowed to fall upon the street; and that while the same were lying upon the street, a motor vehicle, employed plaintiff pneumatic tires, operated along the street and over the said fragment materials, all of which resulted in the injury upon the street that the particles of material so lying upon the street against the plaintiff, and upon the plaintiff, breaking the same.

In another part of the statement of claim it was alleged that the defendants had negligently transported this material in a manner contrary to the provisions of certain ordinances of the City of Chicago, which are set up in haec verba.

Many errors are alleged and relied upon, only a few of which it will be necessary for us to discuss.

Appellants urge that it was error to refuse their motion for a directed verdict, and that the court further erred in giving and refusing instructions. The evidence for the plaintiff we think tended fairly to show the transportation of the material in the negligent manner alleged. The ordinances were introduced in evidence, and there is evidence tending to show that defendants failed to comply with the provisions thereof, and that as a result of negligence in this respect, sandstone and gravel fell upon the street and were allowed to remain there until the pneumatic tires of a passing automobile came in contact with a stone dropped upon the streets and that it was thus thrown through plaintiff's windows, damaging the same as alleged. However, it also clearly appears from the evidence that other trucks of companies, not the defendants, were passing along this street at the time in question, and that the drivers of these other trucks were likewise negligent, and that as a result of their trucks being overloaded, stone and gravel also fell from these upon the street.

The evidence, however, fails to show from which particular truck the stone cast through plaintiff's window fell. The plaintiff preserved the pieces of material or stone which broke his windows, but it is, as we understand it, admitted that it is impossible to determine from the evidence whether this stone was dropped from the wagon of one of the defendants or from some wagon owned by one of the other companies, not defendants, hauling like material upon the street.

In another part of the statement of claim it was alleged that the defendants had negligently transported this material in a manner contrary to the provisions of certain ordinances of the City of Gotonga, which are set up in Long Ago.

Many errors are alleged and filed upon, only a few of which it will be necessary for us to discuss.

Appellants argue that it was error to refuse their motion for a directed verdict, on the ground that the court erred in giving and refusing instructions. The evidence for the plaintiff in this tended rather to show the negligentability of the material in the negligent manner alleged. The instructions were introduced in evidence, and there is sufficient evidence to show that defendants failed to comply with the provisions thereof, and that as a result of negligence on the part of the defendants, the material was ignited and burned. Evidence upon this element was sufficient to warrant the jury in finding that the defendants were guilty of a breach of the ordinance, causing the damage alleged. However, it was strongly argued from the evidence that other causes of consequence, not the defendants, were present which caused the fire to be extinguished, and that the efforts of other people were limited exclusively, and that as a result of their acts the fire was extinguished, and that no or slight of the damage was attributable to the defendants' act. Upon this theory the court gave the objectionable instructions.

The evidence tending to show the other causes which the appellants contended were the proximate cause of the fire, was in conflict with the testimony of the plaintiff, and the jury, in so doing, found it, and that it is impossible to determine from the evidence whether this cause was dropped from the origin of the defendants or from some other cause by one of the other suggestions, not defendants, besides the material upon the ground.

At the request of the defendants, the court instructed the jury that if they should "find from the evidence that gravel was dropped in the street in front of the plaintiff's property and that portions of that gravel were thrown against the windows of the plaintiff, unless they further find from the evidence that the particular gravel which was thrown against the windows of the plaintiff was dropped from the automobile trucks operated by the defendants, you are to find the defendants not guilty." It is apparent that the jury disregarded this instruction as given by the court, and further, that if the instruction correctly stated the law, the peremptory instruction to find for the defendants should have been given.

It would seem to be elementary that a defendant in an action of this character is responsible, if at all, only for such damages as are the natural and probable consequences of his own particular negligence, and without proof that the negligence of which the defendants were guilty was the cause of the injury for which the plaintiff sued, there could not be a recovery. We think the instruction should have been given, and that it was reversible error to refuse it.

At the request of the plaintiff, the court gave to the jury the following instruction:

> "The court instructs you that if you find from the evidence that plaintiff sustained damage as alleged in his statement of claim, and that said damage proceeded from two causes operating together; then if you further find from the evidence that the defendant put in motion one of those causes, he is liable for any damage, if any, the same as though the one cause was the sole cause of said damage, if any."

As this instruction in effect directs a verdict, it was necessary that it contain all the essential elements of the case, and failure to include any essential element in such an instruction would not be cured by other instructions. Appellants point out that this instruction entirely ignores the question of negligence on the part of the defendants, and also ignores

At the request of the defendants, the court instructed the jury that if they should find from the evidence that gravel was dropped in the street in front of the plaintiff's property and that portions of that gravel were thrown against the windows of the plaintiff, unless they further find from the evidence that the particular gravel which was thrown against the windows of the plaintiff was dropped from the automobile truck operated by the defendants, you are to find the defendants not guilty." It is apparent that the jury disregarded this instruction as given by the court, and further, that if the instruction correctly stated the law, the peremptory instruction to find for the defendants should have been given.

It would seem to be elementary that a defendant in an action of this character is responsible, if at all, only for damages - are the natural and probable consequences of his own particular negligence, and without proof that the negligence of which the defendants were guilty was the cause of the injury for which the plaintiff sued, there could not be a recovery. In this the instruction should have been given, and that it was reversible error to refuse it.

At the request of the plaintiff, the court gave to the jury the following instruction:

> "The court instructs you that if you find from the evidence that plaintiff sustained damage as alleged in his statement of claim, and that such damage proceeded from the causes specified therein; then if you further find from the evidence that the defendant, or in another one of their course, he is liable for any damage, if any, the same in thought the one cause was the sole cause of such damage, if any."

In this instruction is stated quite a variety. In

[illegible]

[illegible]

the necessary element of lack of contributory negligence on the part of the plaintiff. It is elementary that unless the act of defendants complained of was negligent, plaintiff could not recover, and it is also elementary, that if plaintiff was himself negligent, this also would preclude recovery. It is unnecessary to quote from the many decisions of our Supreme Court, affirming these propositions. Mooney v. City of Chicago, 239 Ill. 414; Consolidated Traction Co. v. Schritter, 222 Ill. 364; Jones v. Sampsell, 148 Ill. App. 158.

As this judgment must be reversed for the reasons already indicated, it will be unnecessary to discuss the further interesting question raised on the record as to whether, even if it had been proved that the particular material which broke plaintiff's windows was negligently allowed to fall from the wagons of defendants, such negligence could, under the evidence, properly be held the proximate cause of the injury sustained.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

the necessary element of lack of contributory negligence on the part of the plaintiff. It is elementary that taking the act of defendants complained of was negligent, plaintiff could not recover, and it is also elementary, that if plaintiff was himself negligent, this also would preclude recovery. It is unnecessary to quote from the many decisions of our Supreme Court, affirming these propositions. Kenney v. City of Cadiz, 98 Ill. 444; Commonwealth Edison Co. v. Ambrosini, 208 Ill. 364; Jones v. Kimball, 148 Ill. 492, 494.

As this judgment must be reversed for the reasons already indicated, it will be unnecessary to discuss the further interesting question raised on the record - is whether, even if it had been proved that the particular material which plaintiff's window was negligently allowed to fall from the wagons of defendants, was negligence could, under the evidence, properly be held the proximate cause of the injury complained of.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Somerville, P. J., and Dove, J., concur.

209 - 27685

GEORGE W. UNDERWOOD,
Appellee,

vs.

W. K. YOUNG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant below appeals from a judgment in the sum of $192.41, entered in favor of the plaintiff upon the finding of the court.

It appears from the statement of claim that the demand of plaintiff was for services said to have been rendered in representing the defendant before the Board of Review in August, 1920. The plaintiff appeared before the Board of Review at that time, and secured a reduction in the taxation levied against certain premises known as numbers 4601 to 4609 Beacon street, Chicago. The property was not owned by the defendant, but he was agent of the owner, who resided in Boston.

The evidence for plaintiff is to the effect that having on previous occasions represented the defendant before the Board of Review with respect to properties owned by defendant, as well as properties owned by third parties for whom the defendant was acting as agent, he, plaintiff, was on August 10, 1920, called to defendant's office, and employed for the purpose of securing a reduction on the property in question; that the usual time for securing a reduction had expired, and that prompt action was therefore necessary; that plaintiff thereupon examined the property, filed a complaint with the Board of Review, and appeared before the Board in support of the complaint on several occasions; that finally he secured a

total reduction of $11,500 in the valuation placed by the Board upon the property; that he reported the results of his labors to defendant and sent defendant a bill for the same on October 22, 1920, and upon several occasions thereafter.

The evidence for plaintiff further tended to show that a previous suit had been brought by plaintiff against defendant in the Municipal Court, and that the item here sued for was included in the claim there made; that a settlement was made at that time, and that defendant then promised that he would pay to the plaintiff the claim upon which the suit is now brought.

The defendant testified, denying that he employed the plaintiff, and saying that, on the contrary, plaintiff came to his office, and that he, defendant, then gave him a list of some of defendant's own property, and also a list of properties belonging to several other people, upon all of which he desired to have the Board of Review reduce the valuation. With respect to this particular property, the defendant says that he informed plaintiff that the owner had her own lawyer in the city, and that if plaintiff "cared to do anything on the property, to take it up with her, as I had no authority to make a contract of this kind on her property." He denies that he said at the time of the former suit that if this item was dropped he would settle the claim later.

The sole argument for reversal is that the finding of the court is contrary to the weight of the evidence. Appellant urges that as the burden of proof was on the plaintiff to establish his case by a preponderance of the evidence, and as the statements of the plaintiff are denied by the defendant, both appearing to be credible witnesses, this court is compelled to hold that the plaintiff has failed to prove his case by a preponderance of the evidence. In other words, the appellant invokes the well known rule laid down in Peaslee v. Glass, 61 Ill.

94, and other cases following that decision. The cases to which the rule there laid down are applicable are rare. Ordinarily, as has been often said, the courts weigh evidence, they do not count it. The number of witnesses testifying to a given fact or state of facts is important, but not conclusive. We think there are uncontradicted facts in this record tending to corroborate the testimony of the plaintiff. The story of what occurred as he narrates it seems more probable than the story of the defendant. The trial court had the opportunity, which we do not have, of observing the witnesses on the stand, their manner of testifying, etc., and we are not able to say that the rule invoked should be applied here. The judgment of the trial court will therefore be affirmed.

AFFIRMED.

McCurely, P. J., and Dever, J., concur.

228 - 27704.

JOHN H. BACH, as administrator of the Estate of Raymond H. Bach, deceased, Appellant,	APPEAL FROM
vs.	SUPERIOR COURT,
JOSEPH SCHOLL, Senior, Appellee.	COOK COUNTY.

228 I.A. 6167

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a case in which the administrator sued to recover damages sustained by reason of the death of his intestate, caused as alleged by the negligence of the defendants Joseph Scholl, Sr. and Joseph Scholl, Jr.

The declaration alleged that on September 16, 1914, in the City of Chicago, defendants possessed and operated a certain automobile over a public street, known as North Ashland avenue, at or near the intersection of the same with Julian street, and that while the deceased was in the exercise of due care passing along and over the street, defendant so carelessly, negligently and improperly, drove, managed and caused to be driven the automobile, that it ran into deceased, striking him with such violence as to cause his death.

In other counts it was alleged that the automobile was propelled at a high, dangerous and unlawful rate of speed, and that defendants failed to warn deceased, as was their duty. The defendant Scholl, Jr., filed the general issue, while the defendant Scholl, Sr., filed the general issue and a special plea, in which he averred that he did not own, and was not possessed of, and was not using or operating the automobile which the declaration alleged had collided with deceased and caused his death. The cause was tried by a jury, which returned a verdict finding Joseph Scholl, Jr., not guilty and finding Joseph Scholl, Sr., guilty, and assessing the damages at $3,000. Plaintiff made a motion for a new trial, which was overruled, and judg-

ment was entered upon the verdict against Scholl, Jr., and that plaintiff take nothing by his suit as to the defendant Scholl, Sr. From that judgment plaintiff has perfected this appeal. At the close of all the evidence appellee, Scholl, made a motion that the jury be instructed to find in his favor, but this motion was denied by the court. Plaintiff requested the court to give to the jury the following instruction:

> "If you believe from the evidence under the instructions of the court, that the automobile in question was operated negligently immediately before and at the time of the accident, and further believe from the evidence that said automobile was then occupied by the two defendants Joseph Scholl Jr. and Joseph Scholl Sr., and that the same in its course on the day and at the time of the accident, was driven by said Joseph Scholl Jr. while in the employ of and subject to the direction and control of said Joseph Scholl Sr. in the pursuit of the latter's business, then you are to understand, as a matter of law that the negligent operation of said automobile, if any such negligence be shown by the evidence, was negligence on the part of both said defendants for which they should be held responsible, provided you believe from the evidence that such negligence was the direct and proximate cause of the death of the plaintiff's intestate, and that the deceased was in the exercise of ordinary care for his own safety before and at the time of the accident."

As we understand this position, appellee does not argue that this is an incorrect statement of law, but it is claimed that it was not error for the court to refuse the instruction, because there was no evidence in the record tending to prove that the relation of master and servant existed between Scholl, Jr., and the defendant Scholl, Sr., at the time of the accident. We have examined the evidence with care on this point as it is necessarily controlling. The defendants Scholl, Sr. and Jr., were father and son. They were both called as witnesses by plaintiff, and afterwards testified in their own behalf. Their evidence was to the effect that the son owned the automobile; that on the particular day of the accident he had driven the same to the beach; that when he got ready to go home he voluntarily called for his father at a pumping station, for the

purpose of giving his father a ride home as a matter of accommodation and not in the performance of any duty growing out of the relation of master and servant. It was admitted that the son, at the request of his father, drove over to the Ravenswood team track, where the father had some business, and then homeward, during which journey the accident occurred. If this evidence stood alone we think the contention of appellee would be sound. The evidence, however, is not uncontradicted.

Shortly after the accident an inquest was held by the coroner of Cook County on the body of deceased, and at that inquest Joseph Scholl, Sr., was present and testified. He was also present, so the evidence tends to show, while the testimony of his son was taken. A witness, who was present at the inquest, testified that appellee stated at the inquest that on the day of the accident he went from the garage on Van Buren street to the barn on West 13th street, and from the barn on West 13th street to the Loop; that he made five or six stops in the Loop, and that after leaving the Loop, he went in the automobile north to the Lake View Pumping Station; that he went there for the purpose of looking after some teams; that they had some coal to haul up there to the Lake View Pumping Station. Further that he bought the automobile in question from another man, and further, that Joseph Scholl, Jr., at that time testified that he was then employed by his father, Joseph Scholl, Sr. On cross-examination this witness stated that he had an independent recollection of questions and answers at the coroner's inquest; that he remembered some particulars and other particulars he did not.

We do not express any opinion upon the weight to be given to this evidence, but we think the trial court correctly ruled that it was sufficient to be submitted to the jury, and that having so ruled, it was error for the court to refuse the

instruction requested upon the theory that there was no evidence upon which to base it.

For the reasons indicated the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

240 - 27716

PETER C. COORLAS,
Appellant,

vs.

NICK TROHALIS and
CHARLES STILIANOPULOS,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant was plaintiff in the Municipal Court, and brought suit in forcible detainer to obtain possession of certain premises in the City of Chicago. The case was tried by the court; there was a finding of not guilty and judgment on the finding.

The uncontradicted evidence shows that plaintiff and one Marinoous brought a former suit against these same defendants in the Municipal Court of Chicago for the purpose of securing a judgment for the possession of these same premises. That cause was tried before a jury and resulted in a judgment for the defendants, which was entered on February 19, 1921. The defendants in that suit, as in this one, claimed the right to possession under the terms of a certain lease executed by the plaintiff to Gust. Nikos on October 1, 1915, by which these premises were demised from that date until March 1, 1935, at a rental of $100 per month from the date of the lease until September 30, 1925; $125 from October 1, 1925, to September 30, 1930; $150 per month for the remainder of the term. Prior to the beginning of the first suit, the plaintiff caused a five day notice to be served on the defendants. This notice is in evidence, and shows that plaintiff then claimed a balance of rent amounting to $25 was due to him for the month of January, 1921. The notice stated

that unless this was paid within five days "your lease of said premises will be terminated."

It further appears that Caorlan was at one time a partner in the business conducted on the premises, and that on November 4, 1920, he made a bill of sale in which he conveyed his interest in the business to the defendant Stilianopulos.

The plaintiff contends that at the time of that transaction an oral agreement was made, by which the written lease above described should be cancelled. It is argued here that this contention is sustained by a preponderance of the evidence, and we think a conclusive answer to this contention is found in the former judgment which was rendered in a suit begun after the making of this alleged oral agreement. As appellees contend, that judgment must be held to have settled not only the issues which were in fact litigated, but other issues which might have been properly raised and determined in that suit. Spring v. Darlington, 198 Ill. 121.

Appellant, however, further contends that after the former trial there was another oral agreement, whereby in consideration of his promise not to appeal from the judgment there rendered, it was agreed between him and the defendants that defendants would remain in possession only until October 1, 1921, at a rental of $100 per month, and that they would then surrender possession of the premises. Whether such an oral agreement to surrender in futuro a lease which was in writing and under seal could be enforced, we do not need to decide, as the trial court found against plaintiff on the facts. As to this contention and after an examination of the evidence, we are unable to say that the finding of the trial court is against the weight of the evidence.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

that unless this was paid within five days "your lease of said premises will be terminated."

It further appears that Gordian was at one time a partner in the business conducted on the premises, and that on November 6, 1900, he made a bill of sale in which he conveyed his interest in the business to the defendant Gillingham.

The plaintiff contends that at the time of the transaction an oral agreement was made, by which the written lease above described should be cancelled. It is urged that this contention is sustained by a preponderance of the evidence, and we think a reasonable answer to this contention is found in the former judgment which was reversed in a well known opinion of this tribunal and reported in a full report of the making of this judgment and agreement. In supplicant contend, that judgment must be held to have settled not only the issues which were in fact litigated, but other issues which might have been properly raised and determined in that suit. Litton v. Gillingham, 100 Ill. 475.

Appellant, however, further contends that after the former trial there was another oral agreement, entirely in contradiction of his previous set to appeal from the judgment there rendered. It was agreed between the two defendants that defendants would remain in the premises only until January 1, 1911, at a rental of $300 per month, and that they would then surrender possession of the premises. Further such an oral agreement is unknown in law; a lease which was in writing and under seal could be surrender, we do not need to decide, on the trial court found against plaintiff on the facts. In this conclusion and after an examination of the evidence, we see no ground to say that the finding of the trial court is against the weight of the evidence.

The judgment is affirmed.

AFFIRMED.

217 - 17728

JAMES PETRIZZO, Individually and as Guardian of the Estate of Frank Petrizzo, et al.,
Appellees,

vs.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

22 I.A. 617

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of the plaintiff in an action brought on a policy of insurance by the beneficiaries named therein. The insured was one Rose Petrizzo, to whom the policy was issued on June 24, 1919. She died May 10, 1920, thereafter. Plaintiffs filed proofs of her death and, it is conceded, complied with all the other requirements of the benefit certificate necessary to establish a prima facie case of liability.

The affidavit of merits, however, sets up affirmative defenses, alleges that the contract of insurance consisted of the application, the certificate and the constitution and by-laws of defendant company construed together; avers that by the terms of the contract the insured warranted certain statements to be true, which were in fact false, and that the contract is therefore void. It avers that these false statements of the assured were made in her application for insurance, and were that she had never had the disease known as diabetes; that she was in good health at the time of making the application; that she had not within five years preceding that date been under the care of or consulted any physician; that she was in good physical condition and a fit subject of life insurance.

The application, which is in writing, dated June 18, 1919, appears on its face to have been signed by Rose Petrizzo by

her mark. It is witnessed and attested by the medical examiner of defendant, Dr. A. A. Hirsch, and by a friend of the insured, Bessie T. Lopez. The several statements set up in the affidavit of merits appear therein. The plaintiff, however, contends that these statements are representations only, while the defendant argues that the same should be construed as warranties. The same form of application, policy and by-laws were construed by this court in the case of Hancock v. National Council of the Knights and Ladies of Security, gen. no. 26081, in an opinion filed October 17, 1921. We there held that the statements made in response to similar questions were representations only and not warranties, but the Supreme Court granted a certiorari and upon review reversed the judgment of this court and the trial court, and held that the same were warranties. See Hancock v. Knights and Ladies of Security, 303 Ill. 66. We are bound by that decision, and must here hold that these statements are warranties, which if false would void the policy.

We also think that there is undisputed evidence in the record tending to show that at least some of the statements were false. The proofs of death submitted by the plaintiffs to defendant in support of their claim were offered in evidence by the defendant, and show that the cause of the death of the deceased was diabetes, and further state that the only physician who attended the deceased during the last five years of her life was Dr. A. N. Wolford. He was called as a witness by the defendant and testified that deceased came to his office for the first time April 10, 1918; that she again called September 18th, December 1st and March 14th thereafter. Other calls were June 6th, October 10th and 22nd, November 30, 1919, and February 4th and 5th, 1920. The doctor said she came to his office to find out if she had diabetes; that he placed her on a diet, and from time to time made an examination of her urine; that upon each examination he found sugar present; that during all that

time she was suffering from diabetes and that it was the disease which caused her death; that the history of the case was that she had been suffering from the same disease for a year or two prior to the time she came to him; that in April, 1918, he informed her that she was afflicted with this disease. He further testified that when she first came to him as a patient she was accompanied by a daughter, since dead; that the witness could not speak Italian and the patient could not understand English, and the daughter therefore did the talking and acted as interpreter. This evidence, which is uncontradicted, seems to establish the untruth of each of the alleged warranties set up in the affidavit of merits.

But as against this the plaintiff offered evidence which it is claimed brings the case within the rule laid down in Atkinson v. National Council of Knights and Ladies of Security, 193 Ill. App., 215, to the effect "that an insurance company cannot dispute the truthfulness of false statements written in the application for insurance by its agent, without fraud or collusion on the part of the applicant, even though such statements are expressly made warranties on the basis of which the policy issued." The rule there announced commends itself to us as a proposition of law, but it remains to consider whether by the evidence submitted plaintiffs have brought themselves within the rule as there declared. The facts upon which they rely are that Rosa Petrisso could not speak or write the English language; that the application was not read to her before she signed it by her mark, and that as to many of the questions contained therein the same were not asked by the examiner, and that he inserted the answers therein without her knowledge. Three ladies who were present at the time of the examination testified, and the examiner himself was called

as a witness. He says he did not have an independent recollection as to her questions and the answers. The three ladies called testify positively that the applicant was not asked whether she had diabetes, but they agree that a few questions were asked by the examiner. They say that he asked the applicant about her relatives who were dead; they agree that he made no physical examination except as to a possible goitre on the applicant's neck. One of these witnesses says, "He asked her was she sick, and she told the doctor 'No.'"

Another witness says, "The doctor examined her and asked her was she good, and she told him yes. That much was said about her health.

A part of the examination of one witness is as follows:

> "Q. Did the doctor ask Rose Petrizzo whether she had ever had any disease of any kind? A No, sir.
> MR. FULTON: What did the witness tell you?
> THE INTERPRETER: Yes, sir, he asked her---
> THE COURT: You ought not to repeat the question; why did not you tell us exactly what she said?
> THE INTERPRETER: Yes, sir, he asked her---
> WITNESS continuing: Rose Petrizzo told the doctor she did not have any disease, except that trouble with her neck."

Another witness says: "She told the doctor she had never been sick only that thing on her neck."

Appellant argues it was error for the court to permit plaintiffs to introduce evidence as to whether the applicant had read the application she signed, and as to whether the examining doctor had asked the applicant the different questions contained in the application. However this may be, evidence offered by the plaintiffs as above set forth tended to show that the examiner was justified in writing in the statement that the applicant had said that she was in good health and had not had the disease known as diabetes. This being true, and since we must construe the statement as a warranty, it follows that the action of the defende

dant for an instructed verdict should have been granted, and for this error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McGurely, P. J., and Dever, J., concur.

261 - 27737

OTTO BOHLMAN and AMELIA BOHLMAN,
Appellees,

vs.

STEPHEN KRUSZEWSKI,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

228 I.A. 317

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in the trial court sued defendant (appellant) in an action for fraud and deceit. The cause was tried by a jury, which brought in a verdict finding defendant guilty and assessing damages in the sum of $6,500. Defendant made motions for a new trial and in arrest of judgment, which were overruled upon the plaintiffs entering a remittitur of $500, and thereupon judgment was entered upon the verdict for $6,000. Defendant has urged many reasons for reversal.

First, he says that there is a complete failure of the proof to establish scienter on the part of the defendant with reference to the alleged false representations. That in an action for fraud and deceit there must be some proof that the alleged fraudulent statements were made by the defendant either with knowledge of their falsity or with a reckless disregard of whether the same were true or false, is elementary and established by the cases cited. Marvin v. Arbuckle, 81 Ill. 501; Cantrell v. Harding, 240 Ill. 304; Bokman v. Seth, 118 Ill. App. 487. The representations which were alleged in this case to be false and fraudulent were averred to have been made for the purpose of inducing the plaintiffs to enter into a contract for the exchange of certain real estate owned by them and situated in the city of Chicago for a farm situated near the Village of New Lisbon in the State of Wisconsin. The false representations concerned this farm. Other false and fraudulent representations were also alleged to have been made by the

defendant in the course of that transaction, through which it is averred the defendant procured the conveyance by plaintiffs (to defendant's sister) without their knowledge, of certain property owned by them. It is apparent that the damages allowed by the jury were in connection with the procurement of this conveyance. The deed was offered in evidence and purported to have been acknowledged before defendant as a notary public. The defendant does not deny the execution by him of the notary's certificate attached to the deed, nor that he was in entire charge of the transaction by which this deed so executed was delivered to his sister. If, therefore, the jury was justified in finding that fraudulent representations were made by him in this respect, there can be no doubt of his knowledge of the fraud.

There was evidence for plaintiffs tending to show that defendant made certain representations to them as to the condition of the soil, etc., of the Wisconsin farm. Defendant testifies that he had never seen the farm, and that in making these representations he relied on information derived from other persons. He testified that he told plaintiffs that he never had seen the farm and did not know anything about it of his own knowledge. But his evidence on this point is contradicted, and the jury has found against his contention. Moreover, his own testimony shows an extensive knowledge of land in the vicinity of the New Lisbon farm, and that such knowledge extended over many years. We therefore conclude that the evidence of scienter was sufficient.

Defendant, however, further argues that there is no proof of misrepresentations of facts as to the Wisconsin farm, but we think there was proof from which the jury might properly have found that the character of the soil was misrepresented.

He also complains that there is no proof in the record as to the value of the Wisconsin farm at the time of the purchase, and therefore no evidence by which damages could be properly measured.

Drew v. Beall, 62 Ill. 164. It is conceded that ordinarily such evidence would be necessary that the jury might properly assess damages as between vendor and vendee. But this case seems to have been prosecuted on a different theory, viz., that defendant became the agent of the plaintiffs in the transaction, and while acting in their behalf, made the fraudulent representations. In such cases a different rule obtains, and the agent is liable to his principal for all profits which he may have realized from his fraudulent conduct. Steams v. Gavin, 255 Ill. 490; Kerfoot v. Hymen, 52 Ill. 512; Cottom v. Holliday, 59 Ill. 177; Salsbury v. Ware, 183 Ill. 505.

Plaintiffs brought a suit against the owner of the Wisconsin Farm, Bertha Waterman and her husband Allen Waterman, together with one John Logan, real estate agent in Wisconsin. The declaration in that case alleged that Bertha Waterman through the other agents acting in her behalf, had misrepresented the premises to plaintiffs to plaintiffs' damages. A stipulation was entered into stating that all issues involved therein were settled, and that the action should be dismissed. In conformity with this stipulation, that suit was dismissed by the Wisconsin Court October 25, 1920. Defendant claims that settlement is a bar to this suit. Defendant, however, was not a party to that action, and no plea was filed by him in the present suit raising that issue. Moreover as the gist of the contention here must be the dereliction of defendant while acting as the agent of plaintiffs, it is apparent that the defendants in the Wisconsin case would not have been properly parties here.

The proof tended to show that without the knowledge of any parties in Wisconsin, defendant, while acting as a broker for plaintiffs, under the false representation that it was necessary in order to make the deal, procured a deed from the plaintiffs

Byrne v. Boadle, 80 Eng. 267. It is contended that evidently such evidence should be necessary that the jury might properly assess damages on between victor and vanquished. But this does seem to have been proceeded on a different theory, viz., that defendant bears the onus of the plaintiff's in the transaction and this being ruling in their favor, made the transaction representation. It was done a different rule obtains, and the onus is first on the plaintiff for who proving being be may have recourse the defendant remedy. Lynch v. Tarbe, 49 Ill. 62; Pulford v. Hunter, 80 Ill. 212; Dalton v. Pullman, 98 Ill. 477; Dunham v. Dyer, 128 Ill. 305.

Plaintiff brought a suit against the owner of the dynamite car, Burton Dunham and his partner John Dunham, together with the Pike County, Ill. coal mining company in Kentucky. The evidence in that case showed that Burton Dunham through the other owners living in Ky. Ohio, had discovered the property to plaintiff's respondent company. Negotiations were entered into resulting out of all known circumstances were satisfied, and that the action should be dismissed. In conformity with this stipulation, that suit was dismissed by the Kentucky court October 24, 1907. Defendant claims that settlement is a bar to this suit. Defendant, however, was not a party to that action, and he plea was filed by him in the present suit claiming that issue. However on the date of the contamination they must be the declaration of defendant within notice on the agent of plaintiff, it is in evidence that the illumination in the dynamite mine would not have been properly in action here.

The proof tended to show that at least the knowledge of any parties in dynamite, defendant, while acting as a broker for plaintiff, under the Pike representation that it was necessary in order to make the sale, procured a deed from the plaintiffs

conveying certain of their real estate, known as the Lockwood avenue property, to appellant's sister. The proof tends to show that the parties sued in Wisconsin, had no knowledge of this fraud perpetrated upon plaintiffs in Chicago, and received no part of the proceeds of the same. It is also apparent from the evidence that the damages which the jury assessed were for this fraud by defendant, of which the Wisconsin defendants had no knowledge, and in which they took no part. Under these circumstances that settlement is not a bar to this action.

Appellant next says that fraud as to the alleged procuring of the deed of the Lockwood avenue property is neither alleged nor proved. Whatever the averment may be, the proof is clear and overwhelming that appellant obtained this deed without plaintiffs' knowledge, and the proof is practically uncontradicted in the record. As to the averment of the declaration, it is true, we think, that it would have been vulnerable to a demurrer had one been interposed, but we are inclined to think that the averments are sufficient after verdict. Sargent v. Hamblin, 215 Ill. 428; Pa. Company v. Ellett, 132 Ill. 654.

Again, appellant contends that there is no averment in the declaration that defendant was ever the agent of plaintiffs in the transaction. The contract for the exchange of this property is set up in one count of the declaration in haec verba. It shows that the parties constituted the defendant their broker in that transaction, and the evidence shows that plaintiffs paid a part of his fees in the same. We think this was sufficient, at least after verdict. Freestadt v. Dietrich, 84 Ill. App. 604.

Some of the points made by appellant raise questions which may be technically close, but the proof is overwhelming as to defendant's fraud, and this court is not disposed to assist parties who indulge in this sort of transaction. The judgment will be affirmed.

AFFIRMED.

277 - 27753

H. H. EVANS et al.,

vs.

ILLINOIS SURETY COMPANY.

JOINT APPEALS OF HANNAH SCHROEDER, individually, etc. et al., and MARGUERITE RAPP, individually, etc. et al.,

Appellants,

vs.

JAMES S. HOPKINS, Receiver, etc.,

Appellee.

APPEAL FROM

SUPERIOR COURT OF

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause involves two claims, both of which have been before this court on a former appeal (general numbers 26599 and 26600). As will appear from an examination of the opinion filed, the chancellor, overruling exceptions of the claimants to the master's report, ordered that both claims should be dismissed for want of equity. The theory upon which the receiver contested liability is discussed at length in the opinion filed by this court in the former appeal, and at greater length in the case of Evans v. Illinois Surety Co., 290 Ill. App. 199, which was affirmed in Evans v. Illinois Surety Company, 298 Ill. 101. It is sufficient here to say that the contentions of the receiver were not sustained for the reasons stated in these opinions. The decree of the Superior Court was therefore reversed and the cause remanded "with directions to allow these claims for the full amount thereof."

The claims were each based upon transcripts of judgments which had been theretofore rendered in the State of Nebraska

against the Illinois Surety Co. The statutes of Nebraska are in evidence, and these tend to show that under the laws of that state each judgment draws interest at the rate of seven per cent per annum. When the mandate from this court was filed in the Superior Court, and the matter there again came on for hearing, the court entered a decree allowing the claims for the principal amount thereof, with costs and with interest at the rate named in the statutes of Nebraska, up to the respective dates upon which the claims were filed with the receiver. The claimants each insisted on the inclusion of interest up to the date of the allowance of the claim, but were overruled, and the claimants have again appealed to this court, assigning as error the action of the trial court in disallowing interest from the respective dates on which the claims were filed with the receiver.

The receiver contends here that because in the first exception to the master's report the claimants contended that the master erred in not finding that the full amount of the claims should be allowed, "together with costs, forming a part of said judgments and interest accruing on said judgments up to the date of the filing of said claims in this court, at the rate of seven per cent per annum," they should not be permitted now to claim more in this court than they then asked in the trial court. We find on examination of the record, however, that there were other exceptions to the report of the master in which the claim for interest up to the date of the allowance of the claim was insisted on. We, therefore, conclude that this contention of the receiver cannot be sustained. In support of the decree the receiver further contends that "interest is never allowed to a judgment claimant, where by order of a court of competent jurisdiction payment of the judgment has been delayed. If a fund is in the custody of a court and cannot be paid without the order of such a court the judgment does not bear interest." In support of

against the Illinois Surety Co. The statutes of Kansas are in evidence, and there found to show that under the laws of that state such judgment gives interest at the rate of seven per cent per annum. Then the mandate from this court was filed in the inferior court, and the master then merely made entry on the docket the court entered a decree allowing the claims for the principal amount thereon, with costs and with interest at the rate named in the statutes of Kansas, up to the respective dates upon which the claims were filed with the receiver. The plaintiffs made application to the Commissioner of Internal Revenue in the form of the allowance of the claims, but was provided, and the plaintiffs have again appealed to this court, contending as error the action of the trial court in disallowing interest from the respective dates on which the claims were filed with the receiver.

The receiver contends that because in the first exception to the master's report the claimants complained that the master erred in not finding that the full amount of the claims should be allowed, "together with costs, including a part of said judgments and interest accruing on said judgments up to the date of the filing of said claims in this court, at the rate of seven per cent per annum," they should not be permitted now to claim more in this court than they then asked in the trial court. We find on examination of the record, however, that there were other exceptions to the report of the master in which the claim for interest up to the date of the allowance of the claim was included. We, therefore, conclude that the contention of the receiver cannot be maintained. In support of the decree the receiver further contends that "interest is never allowed on a judgment against, where by order of a court of competent jurisdiction payment of the judgment has been delayed. If a fund is in the custody of a court and cannot be paid within the order of such a court the judgment does not bear interest." In support of this

proposition the receiver cites Bowman v. Wilson, 12 Fed. 864; American Iron Co. v. Seaboard Air Line, 233 U. S. 261; Thomas v. Western Car Co., 149 U. S. 116,117; People v. American Loan & Trust Co., 172 N. Y. 377; Gillett v. Chicago Title & Trust Co., 230 Ill. 415. Without discussing these cases at length, it is sufficient to say that we have considered all of them, but do not regard the same as applicable to the facts here appearing.

The proceeding in which the receiver was appointed for the Illinois Surety Co. is purely statutory. The decree which was entered on the same day that the bill was filed, does not and could not find that the Surety Co. was insolvent. That this decree would not in any way affect the legal liabilities of the Surety Co. has been settled by the decision of the Supreme Court in Evans v. Illinois Surety Co., supra. For aught that appears on this record the Surety Co. may have a surplus for distribution to its stockholders when these proceedings shall have ended.

Clearly, therefore, citations as to the rules applied under different statutes and to insolvent corporations are not applicable here. We say this without any prejudice to any rights which different claimants may have as between themselves, if at the time of final distribution it shall be made to appear that the corporation is, in fact, insolvent.

We think that on this record the claimants were entitled to have interest included at the rate of seven per cent per annum up to the date on which the claims were allowed.

For the reasons indicated the decree of the Superior Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

proceedings the receiver cited Bunson v. Pilson, 17 Fed. 9[illegible]; Montana Ice Co. v. Anderson, [illegible] P. 4, 401; Thomas v. Benton Car Co., 140 U. S. 32,33; Pomeis v. Western Loan & Trust Co., 172 N. Y. 277; Gallagh v. Chicago Title & Trust Co., 230 Ill. 418. Without discussing these cases at length, it is sufficient to say that we have considered all of them, but in not regard the same as applicable to the facts here appearing.

The proceeding in which the receiver was appointed for the Illinois Surety Co. is purely statutory. The decree which was entered on the same day that the Ill. Sup. Court, does not and could not find that the Surety Co. was insolvent. That this decree would not in any way affect the legal liabilities of the Surety Co. has been noticed by the decision of the Supreme Court in Inman v. Illinois Surety Co., supra. For such that answers on this record the Surety Co. may have a surplus for distribution to its stockholders when proceedings shall have ended.

Clearly, therefore, objection is to the rules applied under internal statutes and is therefore extraterritorial in not applicable here. If by this method for preferring to our rights which different stockholdings may have in between stockholders, if at the time of final distribution it should be found to appear that the corporation is, in fact, insolvent.

We think that on this record the judgments were entitled to have interest included at the rate of seven per cent per annum up to the date on which the claims were allowed.

For the reasons indicated the decree of the Supreme Court will be reversed and the cause remanded.

Reversed and remanded.

Respectfully, [illegible], Jr., Sec. Surety Co., respondent.

283 - 27759

JAMES V. BAILEY,
Appellee,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellant.

APPEAL FROM
COUNTY COURT OF
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant here was defendant below and was sued by the plaintiff, who in his declaration alleged liability under an insurance policy by reason of the larceny of a certain diamond. The cause was submitted to a jury, who returned a verdict in favor of the defendant. The plaintiff made a motion for a new trial, and afterwards a motion for judgment non obstante veredicto. The court allowed this motion, and thereupon entered judgment against defendant (appellant) for the sum of $693 and costs.

It will be unnecessary to discuss the assignment that the court erred in entering judgment, as it is conceded by the appellee-plaintiff in this court that the court erred in so doing. Aldrich v. Matthias, 141 Ill. App. 590.

But appellant contends although we must reverse the judgment for this error, that this court has the power and should here enter judgment upon the verdict in its favor. This contention is a novel one. There is no precedent for this, nor authority in the Statute from which such power can be inferred. A similar request on similar facts was denied in Goedecke v. The People, 125 Ill. App. 645. The defendant is entitled to have the judgment of the trial court on its motion for a new trial.

Appellee has filed his motion to remand the cause in accordance with the confession of error as heretofore made, which motion has been reserved to the hearing. That motion will now be granted. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McCurely, P. J., and Dever, J., concur.

(28422)

307 - 27785.

FOREMAN BROS. BANKING CO., administrator of the Estate of Nellie Olsen, deceased, Appellee, vs. CHRISTOPHER GROEN, et al. on appeal of Joseph Martin, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

22 I.A. 618

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by one of two defendants from a judgment entered on a verdict of a jury, finding both defendants guilty in an action on the case, and assessing damages at the sum of $1,000. The accident out of which the suit arose (in which plaintiff's intestate, a lady seventy-five years of age, received injuries from which she died), occurred November 6, 1919, at about noon, and at the intersection of Avers avenue, a public highway in the City of Chicago, extending north and south, with Fullerton avenue, another public highway, extending east and west.

The deceased at the time she was injured was standing on the sidewalk on the southwest corner of Avers and Fullerton avenues. The defendant Groen at that time was driving his automobile (a Buick) in a westerly direction on the north side of Fullerton avenue, east of the intersection. The defendant, Joseph Martin, who is appellant here, was about the same time driving his automobile (a Franklin) in a southerly direction at about the center of Avers avenue. Fullerton avenue is about sixty feet wide at this point; Avers avenue about 36 feet wide. It was a misty day, and the streets, which were paved, were wet. Some children were crossing the street at the time; the schoolhouse was located one block to the south. As the defendant Groen proceeded across the intersection, defendant Martin

approached from the north, and the evidence tends to show that a collision was imminent.

To avoid this Green threw on the brakes, and his car skidded, turned round and was driven against plaintiff's intestate, causing her death.

Green testified that he first saw Martin when his, Green's, car was about ten feet back of the building line of Avers avenue, and that Martin was then about twenty feet north of the building line of Fullerton avenue and about the middle of Avers avenue. He says that the automobiles came within about a foot of each other, and on this point is corroborated by the testimony of a witness, Mrs. Jarosse, who says, "I couldn't tell how near the cars came together, it was very close to a smash," and Martin "went right on to Fullerton avenue, up to the car tracks before it stopped." The appellant Martin's evidence is to the effect that "when I first saw the other car, I was about fifteen or twenty feet north of the building line of Fullerton avenue. Fullerton avenue there is much wider than Avers avenue. When it started to turn, it was just about at the intersection, and I was about at the intersection on Avers avenue then."

It thus appears that appellant's car was farther away from the intersection than was Green's car; that he was proceeding as fast if not faster than Green.

We agree with the contention of counsel for appellee that the jury was justified in believing that there was a foolish race between these drivers to see which would first get across the street, and that the jury very properly held both of them liable for the accident which occurred.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

approached from the north, and the evidence tends to show that a collision was imminent.

To avoid this threat to the bridge, and the car behind, Motor Vessel had two alternatives available to the master, neither of which was desirable.

Given hypothetical that he did not first slow down, Tyson's, her one chance was that she might be the leading line of the bridge tender, and that Bertin would leave the bridge of the oncoming line of traffic alone - and keep the middle of river ahead. It may be that the accomodation was within least 1 foot of each other, and at this point it appears that by the testimony of a witness, Mrs. Jackson, who says, "I couldn't tell how near the cars came together, it was very close to a touch," and Bertin "went right on in (illegible) by in the car behind before it stopped." The applicant herein evidence in the effort that "when I first saw the other car, I was about fifteen or twenty feet north of the building line of Pulaski avenue. Pulaski avenue there is much wider than Ivers avenue. When it reached to them, it was just about at the intersection, and I was about at the intersection or very nearer them."

It then appears that applicant's car was further away from the intersection than was Tyson's car, and it was therefore as fast or not farther than theirs.

In order with the contention it appears for applicant that the jury was justified in believing that there was a violation upon behalf of those drivers to see what could have and should have been done for the negligence which occurred.

The judgment in behalf of the defendant.

(illegible)

3 - 27144

OLIVER O. MIKSCH,
Defendant in Error,

vs.

MATHEW N. SCHMITT,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

223 Ill. 318

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error Schmitt, in the form of a letter, gave defendant in error Miksch, a real estate broker, the exclusive agency to sell, and privilege to buy, within three months therefrom, a piece of real estate at the price of $7500, which the parties recognized meant cash.

Miksch presented various offers from a customer to buy on terms part cash and part in future payments, including an offer for $8,000 on such terms, all of which Schmitt rejected. On October 28, 1919, Miksch sent a letter to Schmitt stating the terms of his customer's final offer of $8,000, only part of which was in cash, and asking him to reply whether the terms were satisfactory, saying:

> "If you do not wish to sell upon anything but a cash basis * * * and, therefore, do not wish to make this deal, please be advised that I will exercise the option given to me to purchase the property at $7,500 cash."

Schmitt did not reply. Three days later, October 31, (or as contended by Schmitt, November 3) one Griser, who was in the employ of Miksch and had carried the previous offers of his customer, went to Schmitt and, according to his testimony, "made him a proposition for cash at a price of $7500 according to the exclusive sales contract that he had entered into," and Schmitt said: "I'll have nothing more to do with you and I want nothing

Plaintiff in error commits, in the form of a letter, gave defendant in error Kilmon, a real estate broker, the exclusive agency to sell, and privilege to buy, within three months therefrom, a piece of real estate at the price of $7500, which the parties contemplated would mean.

Kilmon procured various offers from a customer to buy on terms part cash and part in future payments, including an offer for $6,000 on such terms, all of which plaintiff rejected. In October 28, 1919, Kilmon sent a letter to Summit stating the terms of his customer's final offer of $6,500, only part of which was in cash, and asking him to reply whether the terms were satisfactory, saying:

> "If you do not wish to sell upon particular terms but a cash basis - - - - - Therefore, do not wish to make this deal, please be advised that I will exercise the option given to me to purchase the property at $7,500 cash."

Summit did not reply. Three days later, Kilmon (or as contended by Summit, November 5) sent Grider, who was in the employ of Kilmon and had carried the previous offers of his customer, sent to Summit and, according to his testimony, "made him a proposition for cash of a price of $7500 according to the exclusive sales contract that he had without lies," and Summit

more to do with the sale." Miksch testified that he had made a contract to sell the property to said customer at $8,000, on which she had made a deposit of $500.

On this state of facts Miksch claimed a breach of contract to sell the property to him at $7,500, and damages to the extent of the difference between that sum and $8,000. But assuming that Miksch did all that was necessary to exercise his option and that Schmitt refused to carry out his agreement to convey to him, yet the measure of damages in such a case would be the increased fair cash market value of the land over the contract price on the date of the breach, (Dady v. Condit, 209 Ill. 488) and no proof was offered to show the market value of the land on the date of the breach or at any other time. The mere fact that plaintiff had an offer to purchase the same on time payments at a price greater than $7,500 constituted no such proof. While the abstracted decision in Pozvic v. Harford, 211 Ill. App. 273, purports to lay down a different rule it can hardly be deemed authority on the subject for the rule was not questioned or discussed in that case, and it was practically conceded that the difference between the contract and sale price measured the liability in that case.

Nor did the jury assess the damages in this case at the difference between the option and contract price but at $240. If they did so on the theory that plaintiff was entitled to a commission on $8,000 it was not in accordance with the theory of the action. The action was for a breach of contract and not to recover a commission. Plaintiff so conceded. The verdict and judgment of the court, therefore, had no basis in the evidence adduced. It is settled law that a plaintiff can not state one cause of action and recover on a different cause made by the evidence. But in the case at bar there was no

more to do with the sale." Although certainly that he had made a contract to sell the property to said manager at $8,000, on which she had made a deposit of $800.

On this state of facts Dilmuth claimed a breach of contract to sell the property to him at $7,500, and sought to the extent of the difference between that sum and $8,000. Not withstanding that Dilmuth did all that was necessary to exercise his rights and that Dobbs refused to carry out his agreement to convey to him, yet the measure of damages in such a case would be the increased fair cash market value of the land over the contract price on the date of the breach. (Black v. Dowell, 200 Ill. 368) and no proof was offered to show the market value of the land on the date of the breach or at any other time. The mere fact that plaintiff had an offer to purchase the land on that premise at a price greater than $7,500 constituted no such proof. While the contrary decision in Hurley v. Dwyer, 213 Ill. App. 372, purports to lay down a different rule it can hardly be deemed authority on the subject for the rule was not established or followed in that case, for it was principally decided that the difference between the contract and the price obtained was the liability in that case.

Why did the jury assess the damages in this case at the difference between the sales and contract price but at $800. If they did so on the theory that plaintiff was entitled to a recovery on $8,000 if we read it conclusively with the theory of the evidence. The jury may by a verdict of defendant and not be tender a consideration. Plaintiff no doubt. The verdict and judgment of the court, therefore, had no basis in the evidence adduced. It is settled law that a plaintiff can not state one cause of action and recover on a different cause made by the evidence. But in the case at bar there was no

evidence whatever as to damages to support the judgment.

Assuming there was a breach of contract, there being no competent evidence of damages therefrom, defendant was entitled as a matter of law to the instruction he requested for a verdict in his behalf. Accordingly the judgment must be reversed. Where plaintiff neglects to present evidence which it is in his power to produce at the trial, the cause will not be remanded to afford him a second opportunity of doing so. (Segal v. Chicago City Ry. Co., 216 Ill. App. 11, 17.)

Accordingly the judgment will be reversed.

REVERSED.

Morrill and Gridley, JJ., concur.

evidence whatever on to damages to support the judgment.

Assuming there was a breach of contract, there

being no competent evidence of damages resulting, defendant

was entitled as a matter of law to the instruction in ques-

tion for a verdict in his behalf. Accordingly the

judgment must be reversed. Here obviously neglects to

present evidence which it is in his power to present at the

trial, the cause will not be remanded to afford him a second

opportunity of doing so. (Young v. Gulbenk City, Inc.,

112 Ill. App. 2d, 17.)

Accordingly the judgment will be reversed.

Reversed and remanded, it. so ordered.

20 - 27810

GEORGE R. BIGGER,
Defendant in Error,

vs.

G. B. VAN HEYNINGER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 618

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this suit the statement of claim was filed against plaintiff in error and others on the theory of a joint liability. Later all of the defendants except plaintiff in error were dismissed out of the case and a judgment was entered against plaintiff in error alone without amending the statement of claim by omitting the charge of joint liability. It is fundamental that a judgment against one alone will not stand on a judgment charging a joint liability unless some of the defendants make a personal defense, as infancy, lunacy, bankruptcy or the like. See Umlauf v. Chacamas Tropical Products Co., 209 Ill. App. 291, 293, and cases there cited.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Morrill and Gridley, JJ., concur.

50 - 27880

EVA VRADELIC,
Appellant,

vs.

JOHN POLLAK,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

220 I.A. 018

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was an action for slander begun within two months after the alleged slanderous words were spoken.

The original declaration alleged the time thereof to be October 27, omitting the year, to which the general issue was filed. Two years and three months later the declaration, by leave of court, was amended by inserting the year. Thereupon appellee pleaded that the cause of action did not accrue within one year "next before filing the amendment," and appellant replied that it did occur within one year "next before the commencement of the suit." The court sustained the demurrer to the replication for not controverting matter alleged in the plea, and appellant standing by his replication, judgment was entered on the plea, from which this appeal is taken.

It will be noted that not only was the replication defective in not controverting the matter alleged in the plea, but the plea was defective in substance, unless it can be said the amended declaration stated a new cause of action. But the amendment did not state a new cause of action. It merely cured a defective statement of the original declaration, and amounted to "no more than a restatement, in a different or better form, of the cause originally declared on." (New Staunton Coal Co. v. Fromm, 286 Ill. 254, 257.)

Besides, the Statute of Limitations does not apply

"to matters of mere pleading, and should not be given that effect indirectly, by holding that an imperfect statement is a cause of action is no statement of it." (Chicago City Ry. Co. v. Keckendahl, 138 Ill. 300, 304.)

The plea, therefore, constituted no defense to the declaration as amended, and while plaintiff did not specifically demur thereto yet his defective replication to a plea bad in substance should, under the rule laid down in Bloom v. Morrison, 264 Ill. 279, 287, have been treated as a demurrer. There, as here, the replication denied that there was no occasion to deny, and the court said that as the matters not denied, therefore admitted, constituted no defense to the declaration, the defective replication amounted to a demurrer to the plea, and that it was error to enter judgment on the latter. For the same reasons there stated the judgment here must be reversed and the cause remanded.

REVERSED AND REMANDED.

Merrill and Gridley, JJ., concur.

59 - 27891

1847a

ROYAL H. MYERS,
Appellee,

vs.

FORT DEARBORN CASUALTY UNDERWRITERS,
Appellant.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

22 I.A. 319

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on an insurance policy indemnifying the insurer against loss of an automobile by theft. The appeal is from a judgment in plaintiff's favor for $700.

Some of appellant's points are not open for our consideration, namely, the claim of excessive damages, and of error in refusing a tendered instruction. We cannot review the former because it does not appear as among the grounds of the motion for a new trial, (Jones v. Jones, 71 Ill. 548) and is not assigned for error here. (Brewer, Hoffman Brewing Co. v. Boddie, 162 Ill. 346; Hearst's Chicago American v. Spiss, 117 Ill. App. 436, 440.) Besides, we would be disposed to say that there was sufficient basis for the judgment in the testimony on the subject given by defendant's own witnesses.

As to the error in refusing instructions, only those refused and not those given are shown in the abstract. The refused instructions may have been covered by other instructions or might not be deemed objectionable when considered with other instructions that were given. In this condition of the abstract, therefore, the point will not be considered. (P. C. C. & St. L. Ry. Co. v. Smith, 207 Ill. 486; Heavely v. Harris, 139 Ill. 526, 530.)

The only other contention argued is that there was a breach of a promissory warranty. The policy provided that the automobile should be continuously equipped with a locking device known as "Delco & Mutual Lock," and that "The assured undertakes during the currency of this policy to use all diligence and care in maintaining the efficiency of said locking device and in locking the automobile when leaving the same unattended."

The policy contains statements of the insured on which the policy was issued. Among them is the statement that it was equipped with a "Delco Lock Neutral Lock." The above provision with regard to the locking device is in the form of an endorsement pasted on the policy. The evidence does not disclose the difference between a "Delco & Mutual" and a "Delco Neutral Lock." For aught that appears in the evidence they may be the same. At any rate there is nothing to indicate that the loss by theft was due to having one instead of the other. The point made is that when the stolen car was found the lock was unlocked and had the key, or something resembling the key, broken off therein and did not show that it had been tampered with, and hence that plaintiff must have left the car unlocked. Plaintiff testified, however, that he locked the same when he left it in the garage and still retained the key in his possession. We do not think there was a preponderance of evidence to the effect that he violated the alleged promissory warranty of the policy.

It is also urged that while the judge was temporarily absent from the court room counsel for plaintiff indulged in inflammatory remarks to the jury. The court's attention was called to the same almost immediately and the jury were instructed to disregard the remarks excepted to. We do not think

The only other contention urged is that there was a breach of a warranty warranty. The policy provides that the motorcycle should be continuously equipped with a locking device known as "Yales & Mutual lock," and that "the insured undertakes during the currency of this policy to use all diligence and care in maintaining the efficiency of said locking device and in locking the cycle when leaving the same unattended."

The policy machine statements of the insured on which the policy was issued. Among them is the statement that it was equipped with a "Yales lock Mutual lock." The above provision with regard to the locking device is in the form of an endorsement pasted on the policy. The evidence does not disclose the difference between a "Yales & Mutual" and a "Yales Mutual lock." Nor might that appear in the evidence they may be the same. At any rate there is nothing to indicate that the loss by theft was due to having one instead of the other. The point made is that when the plaintiff car was found the lock was unlocked and had the key, or something resembling the key, broken off therein and the key above that it had been tampered with, but before that plaintiff must have left the car unlocked. Plaintiff testifies, however, that he locked the same when he left it in the garage and still retained the key in his possession. We do not think there was a preponderance of evidence in the effect that he violated the alleged promissory warranty of the policy.

It is also urged that while the judge was unnecessarily severe in the manner in which he conducted the plaintiff testimony in interlocutory courses in the jury. The court's attention was called to the case almost immediately and the jury were instructed to disregard the remarks excepted to. We do not think

they were of such a prejudicial nature as to call for a reversal of the judgment. The only effect they could have had was with respect to the amount of damages which, as before stated, there was sufficient evidence to sustain.

Accordingly the judgment is affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

74 - 27906

WILLIAM J. LLOYD and
ALICE LLOYD,
Appellees,

vs.

FREDERICK G. MICHAELIS and
JENNIE M. MICHAELIS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgmentfor possession in a forcible detainer suit. No question arises as to the relationship of the parties as landlord or tenant, or as to the right of action, if there was sufficient evidence to sustain the court's finding that there was a violation of the lessees' covenant not to use the leased premises for the sale of spirituous liquors.

The assignment of error relied on is that the finding and judgment are against the weight of the evidence. We do not think so.

Plaintiff called four witnesses, Phoenix, Edwards, (whose testimony it was agreed would corroborate that of Phoenix) Mateer and a policeman. Phoenix was a roomer in defendants' house on the premises. He testified while there Mr. Michaelis made three sales of whiskey, two of them in the presence of Edwards. That he paid for one bottle and Edwards for the other two. The bottles of whiskey so sold were produced in court and the contents identified as spirituous liquor by Mateer. Phoenix also gave evidence tending to show another sale by Mrs. Michaelis to a stranger and that she said 'they manufactured beer on the premises.' The policeman testified

This appeal is from a judgment for possession in a forcible detainer suit. No question arises as to the sufficiency of the pleadings - a landlord at sufferance, or on the right of action, if there was sufficient evidence to sustain the court's finding that there was a violation of the lessees' covenant not to use the leased premises for the sale of spirituous liquors.

The assignment of error relied on is that the finding and judgment are against the weight of the evidence. We do not think so.

MARGARET WILLIS TAGG testified, CHARLES, (whose testimony it was agreed would corroborate that of Phoenix) Mabry was a policeman. Phoenix was a tenant in defendants' house on the premises. On Saturday night Mrs. Mitchell made three sales of whiskey, two of them in the presence of Mabry. They had paid for one bottle and drunk for the other two. The testimony of Mabry as well was produced in court and the witness identified as spirituous liquor by taste. Phoenix also gave evidence tending to show another sale by Mrs. Mitchell to a stranger who that she said 'they

to finding in the garage on the premises "a lot of mash, liquor, barrels, sugar, a still and a gas stove," and that Mr. Michaelis was brought before the court on the charge of violating the Prohibition Act, but was discharged on his plea of ignorance of such facts and that he had sublet the garage to a person whose name he did not know and whom he saw but once.

When Mr. Michaelis was called by plaintiff under section 33 of the Municipal Court Act his counsel warned him of the possibility of prosecution in the Federal Courts. As a result of this warning he was not interrogated respecting the matters in dispute. The defense called but two witnesses, Mrs. Michaelis who made a specific denial of the alleged sale by her and a general denial of the sale or manufacture of liquor on the premises. The other witness' testimony had only a remote bearing on the issue. There was no specific denial of the sales by Mr. Michaelis as testified to by Phoenix, or the existence of a still in the garage as testified to by the policeman. Proof of these matters established a violation of the covenant for which the lease was cancelled. Whether Mrs. Michaelis knew of her co-tenant's acts she was, in our opinion, chargeable with the consequences, if not with the knowledge of her co-tenant's use of the premises in violation of their covenant, the evidence as to which stands practically uncontradicted.

The defense of Mr. Michaelis in the criminal case constitutes no evidence in this case that he did not use the premises as testified to by the policemen, nor would it explain the incriminating facts he testified to.

to finding in the garage on the premises "a lot of junk, liquor, barrels, sugar, a still and a gas stove," and that Mr. Kidwell was brought before the court on the charge of violating the Prohibition Act, but was discharged on his plea of ignorance of such fact and that he had neither the garage or a person about same be did not know what he has said.

Then Mr. Kidwell was called by plaintiff under section 24 of the Municipal Court Act and his counsel warned him of the possibility of prosecution in the Federal Courts. As a result of this warning he was not interrogated respecting the matters in dispute. The defense called but two witnesses, Mrs. Kidwell who made a specific denial of the alleged sale by her and a general denial of the sale or manufacture of liquor on the premises. The other witness' testimony had only a remote bearing on the issue. There was no specific denial of the sale by Mr. Kidwell or verified to be illegally, or the existence of a still in the garage as testified to by the policemen. Proof of these matters established a violation of the covenant for which the lease was cancelled. Neither Mrs. Kidwell knew of her co-tenant's acts she was, in our opinion, chargeable with the nonexistence, if not with the knowledge of her co-tenant's use of the premises in violation of state government, the evidence as to which stands practically uncontradicted.

The defense of Mr. Kidwell in the criminal case constitutes no evidence in this case that he did not use the premises as testified to by the policemen, nor would it explain the incriminating facts he testified to.

We shall not review the purely technical arguments advanced by appellant as to the insufficiency of the evidence, which in our opinion fully supports the court's finding.

The judgment is affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

We shall not review the usual technical arguments advanced by appellant as to the insufficiency of the evidence, which in our opinion fully supports the jury's finding.

The judgment is affirmed.

AFFIRMED.

Barrett and O'Brien, JJ., concur.

83 - 27915

P. O. FISH and A. W. SCHULKAMP, copartners doing business as FISH & SCHULKAMP, Appellants, vs. C. C. CLARK, Appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant in this case filed a special appearance and plea to the jurisdiction, alleging that he was a non-resident of this state, and that at the time of service of process upon him he was in this county temporarily for the sole and only purpose of attending upon the trial of a cause pending therein in which he was defendant. Plaintiffs filed a general demurrer to the plea, which the court overruled, and by which they elected to stand. Thereupon the writ was quashed and judgment entered against them, from which this appeal is taken.

The general rule in this state on the question so raised is that in the absence of fraud, artifice or trick, on the part of the plaintiff or some one acting for him, a non-resident person within the jurisdiction as a witness or party to a law suit is not exempt from service of civil process. (Greer v. Young, 120 Ill. 187; Willard v. Zehr, 215 Ill. 148; Brya v. Thomas, 186 Ill. App. 281.)

Citing authorities from other jurisdictions to the contrary, appellee contends that the cases referred to do not justify the assertion that the courts of this state are committed to the rule above stated. With that contention we do not concur.

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The general rule in this state on the question as raised is that in the absence of fraud, artifice or trick, on the part of the plaintiff or some one acting for him, a non-resident person within the jurisdiction as a witness or party to a law suit is not exempt from service of civil process. (Turner v. Fraser, 140 Ill. 577; Fielding v. Ingle, 112 Ill. 148; Ryan v. Thomas, 156 Ill. App. 221.)

Citing authorities from other jurisdictions to the contrary, appellee contends that the cases referred to do not justify the conclusion that the courts of this state are committed to the rule above stated. With such contentions we do not concur.

In the Greer case, supra, the defendant, a non-resident, was served with civil process while in this state for the purpose of assisting his attorney in taking depositions before a notary public in a case brought in his own state in which he was a party. He claimed exemption from service under such a state of facts and the service was quashed. In reversing the judgment the court, in indicating its opinion with respect to such claim, referred to the fact that there was no claim that the service of process was obtained by any artifice, trick or fraud on the part of the plaintiff in the case or of any one acting in his interest, and said that the privilege or immunity which the common law extended to a party or a witness attending court was, by the general current of authority, expressly limited to cases of arrest on civil process, and the court expressly declared that there was no sufficient reason for departure from that rule. Because, however, the court went further and held that a notary could not be regarded under such circumstances as an instrument or agency of the foreign court in which the suit was pending, and does not fall within the category of tribunals contemplated by the rule, appellee urges that what the court said respecting the rule was dictum. Nevertheless the Supreme Court in Willard v. Lehr, supra, again recognized the rule, citing from the Greer case and others, and in the case of Brya v. Thomas, supra, the rule was declared to be settled law in this state. Because the facts at bar are somewhat different from those in the cases cited, we would not be justified in disregarding the clear intent of our courts to observe such rule whatever may be the weight of authority on the subject in other jurisdictions. Under the rule and state of facts pleaded appellee was not entitled to exemption from service.

In the first case, [illegible], the defendant, a [illegible] [illegible], was served with legal process while on this state for the purpose of assisting his attorney in taking depositions before a notary public in a case brought in his own state in which he was a party. The plaintiff complained from service under such a state of facts and the service was quashed. In reversing the judgment the court, in [illegible] the opinion with respect to such claim, referred to the fact that there was no claim that the service of process was obtained by any artifice, trick or fraud on the part of the plaintiff in the case or of any one acting in his interest, and said that the privilege or immunity which the person has extended to a party or a witness attending court was, by the general current of authority, expressly limited to cases of direct or civil process, and the court specifically declared that there was no sufficient reason for departure from that rule. Because, however, the court also intimated and held that a party or witness might be induced under such circumstances or an inducement or agency of the foreign court in which the suit was pending, and that not full within the category of criminals [illegible] of the rule, [illegible] that that the court will [illegible] the rule was [illegible]. Nevertheless the [illegible] in Gallagher v. Hoff, supra, which reversed the rule, citing from the Hyner case and others, but in the case of Hyner v. Hyner, supra, the rule was declared to be settled law in this state. Because the facts of her own memorandum differ from those in the cases cited, we could not be justified in disregarding the clear intent of our courts to observe such rule wherever any in the [illegible] of [illegible] in the majority in the majority in [illegible]. Since the rule and made of facts similar appeling our judicial [illegible] from [illegible].

Accordingly the judgment will be reversed and the cause remanded for proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED.

Morrill and Gridley, JJ., concur.

92 - 27924

ROSE SPIEGEL,
Plaintiff in Error,

vs.

SIMONS, DAY & COMPANY, a corporation, A. B. LEACH & COMPANY, a corporation, CHICAGO TRUST COMPANY, a corporation,
Defendants in Error.

ERROR TO
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This writ of error seeks the reversal of a decree confirming the master's conclusions of fact and law and dismissing the bill of complaint for want of equity.

The original bill is predicated on the claim that complainant engaged in stock transactions with defendant Simons, Day & Company, which did a brokerage business in stocks, etc., upon an understanding and agreement that none of the stocks dealt in should be delivered to or paid for by complainant, but that said company should adjust the deals with her by settling the difference between the market value of the stock dealt in at the time of making a deal and the market value at the time of closing it. The bill avers that pursuant to such arrangement she from time to time deposited with said company collateral, consisting of certain stocks and bonds, as margins for the protection of said company against depreciation in the market value of the stocks dealt in, that said company has refused to return the same after demand therefor, and still holds and threatens to sell the same, and prays that said company be restrained from disposing of said collateral and required to deliver the same to complainant,

MODIFYING THE OPINION OF THE COURT.

This suit of error seeks the reversal of a decree sustaining the sheriff's demurrer of fact one Lee and sustaining the bill of complaint for want of equity.

The original bill is predicated on the claim that complainant engaged in stock transactions with defendant Lewis, Day & Company, which did a brokerage business in stocks, etc., upon an understanding and agreement that more of the stocks dealt in should be delivered to or paid for by complainant, but that such agreement could not be kept with her by crediting the difference between the market value of the stock dealt in at the time of making a call and the market value at the time of closing it. The bill avers that pursuant to such arrangement she from time to time furnished with said company collateral, consisting of various stocks and bonds, as margins for the protection of said company against depreciation in the market value of the stocks dealt in, that said company then refused to return the same after demand therefor, and still holds and therefore is wrongfully so, and prays that said company be restrained from disposing of said

also for the appointment of a receiver to hold the collateral, for the production of said company's books and accounts showing the transactions, and for an accounting and general relief.

On leave granted a supplemental bill was filed setting up the transfer and disposal of certain of said securities to other parties, after the filing of the bill, of which, as well as of all the said transactions and their gambling nature, it is averred said parties had notice and knowledge, and asks that they be declared holders of said securities in trust, or required to account for the value thereof, and prohibited from selling or otherwise disposing of the same.

The master's report covers seventeen printed pages of the abstract. It recites the various steps taken in the transactions in question, the negotiations had, between whom they were made, the course of business pursued, and when and how the statements of accounts between the parties were made. The primary question for the master's determination was whether such transactions were gambling transactions, as alleged in the bill. It is apparent, and practically conceded, that if they were not of that character then there was no ground for the equitable relief sought. The master found that they were bona fide transactions in which the actual purchase and sale and delivery of stock were contemplated and had, and that there was a balance of indebtedness to Simons, Day & Company, to satisfy which it sold under due authority the collateral deposited with it and that the purchases thereof by the parties named in the supplemental bill were made in good faith for cash in the usual course of business, for the full value and fair market price, and without notice of complainant's claims.

The course and nature of the transactions in question, as found by the master, were as follows:

also for the expenditure of a necessity to pay the salaries, for the procuration of said company's books and accounts showing the transactions, and for an accounting and general relief.

He then presented a supplemental bill on the 12th October, up the transfer and disposal of certain of said securities in other parties, after the filing of the bill, of which, as will of all the said transactions and their gambling nature, it is alleged that petitioner had neither any knowledge, and that they by designed brokers of said securities in trust, or required to account for the value thereof, and prohibited from selling or otherwise disposing of the same.

The master's report covers seventeen printed pages of the abstract. It recites the various steps taken in the proceedings in matters, the depositions had, between when they were said, the course of testimony proceed, and also and the statements of counsel before the petition were made. The primary question for the master's determination was whether such transactions were gambling transactions, as alleged in the bill. It is admitted, and probably proved, that if they were not of that character then there was no ground for the equitable public remedy. The master found that they were some like transactions in which the usual purchase and sale and delivery of stock were contemplated, and that there was a balance of indebtedness in dispute, but a company, in reality which it was proved that notwithstanding the collateral disposition it and that the purchases proved for the petition based in the supplemental bill were made in good faith for such in the usual course of business, for the full value and for another price, and without intent of speculation.

The course and nature of the transactions in question, as found by the master, were as follows:

In May, 1919, Rose Spiegel, or her husband Max Spiegel, was the owner of certain bonds which had been put up as collateral with Marcuse & Co., another brokerage firm, to secure the purchase of certain shares of stock bought by said firm for the account of Rose Spiegel on the New York Stock Exchange. About the middle of that month she had an interview with an agent of Simons, Day & Company, with reference to transferring to it her account with Marcuse & Co., and its purchase and sale of stocks for her. Thereafter such account was transferred, Simons, Day & Company paying Marcuse & Co., $59,510.20, which covered her indebtedness to Marcuse & Co., and the value of her securities deposited with the latter firm.

Between May 28 and June 12, 1919, Mrs. Spiegel purchased and sold through Simons, Day & Company various stocks aggregating in price $27,352.50. There were no losses on her account between those dates. All the transactions for the purchase and sale of stock for her account were carried out on the New York Stock Exchange through a member thereof, a correspondent of Simons, Day & Company. The purchase price of such shares was charged on the books of the New York correspondent to Simons, Day & Company, and on the books of the latter to the account of R. Spiegel.

It coming to the attention of the company's vice president that R. Spiegel was a woman, and being contrary to the firm's business methods to carry loan accounts for women, Mrs. Spiegel was notified she must pay for the stocks purchased as the company would not carry her stocks on a loan account. Thereupon she and her husband, Max Spiegel, came to its office and claimed that the account was his. He stated, too, that he was financially responsible and wanted the account carried in his name.

In May, 1947, Dow Chemical, as has happened has
Diglogul, was the scene of various bombs which had been put up
on collusively with Hermosa Co., another Kimberley firm, to
assume the purchase of certain shares of stock bought by said
firm for the account of Dow Diglogul on the New York Stock
Exchange. Since the middle of that month the bond an inferior
with an space of Hermosa, Ltd a company, with reference to
transferring to its her account with Hermosa Co., and the
purchase and sale of stocks for her. Thereafter such accounts
was discovered, Hermosa, Ltd a company, acting through Hermosa Co.,
$20,000.00, which covered her indebtedness to Hermosa Co.,
and the value of her account also credited with the Hermosa firm.

Between May 30 and June 10, 1949, Mrs. Diglogul pur-
chased and sold through Hermosa, Ltd a Dowmont various stocks
amounting in price $19,000.00. There were no losses on her
account between these dates. All the transactions for Mrs
Diglogul and sale of stock for her account were carried out on
the New York Stock Exchange through a broker thereof.

Hermosa, Ltd a company, acting through Hermosa Co., a
correspondent of Hermosa, Ltd a company. The purchase price of
such stocks was charged on the books of the New York correspondent
to Hermosa, Ltd a company, and on the books of the broker to the
account of Mrs. Diglogul.

It occurs to the attention of the company's vice
president that Mrs. Diglogul was a member, and being connected to
the firm's business without be using her correct or name.
Mrs. Diglogul was notified the week day for the stocks purchased
on the company would not carry her shares on a firm account.
Thompson who and her husband, Dow Diglogul, come to the office
and claimed that the account was hers. He admitted, too, that he
was financially responsible and handled the account carried in
his name.

Thereupon it was carried in the name of M. Spiegel or Milton Spiegel, a name previously used by Mrs. Spiegel and given as the name of her husband.

For about two months thereafter Mr. Spiegel called personally at Simons, Day & Company's office and gave a large number of orders for the sale and purchase of stocks, which were purchased or sold in the usual way, as above stated, on the New York Stock Exchange. In each case there was a bona fide purchase or sale of the stocks as ordered, which were actually delivered on the following day under the usual rules followed on the New York Exchange, and for each transaction Simons, Day & Company mailed to M. Spiegel prior to June 12th, and to M. or Milton Spiegel after that date, a written confirmation of the purchase or sale, and at the end of each month a complete statement of the account showing all transactions had during the month, the date of each, the description of the stock, the price, the quantity bought or sold, etc. These confirmations were received and no objection made to them by either Rose or Max Spiegel. All losses occurred after the account had been transferred on the books as aforesaid in the name of her husband. He is not a party to this suit.

Each confirmation contained the terms under which the purchases and sales were made, and recited an agreement for the right to sell the securities at public or private sale without notice when such sale was deemed necessary for the company's protection, and also the right to close such transactions when protection was exhausted or so nearly so as to endanger the account with said company. Pursuant to such understanding Simons, Day & Company sold the bonds in question to the several parties mentioned. The total debit balance against M. Spiegel at the time the collateral was

Thereupon it was written in the name of R. Upjohn or Milton Upjohn, a name previously used by Mrs. Upjohn and given as the name of her husband.

For about two months thereafter Mr. Upjohn called personally at Simons, Hoy & Company's office and gave a large number of orders for the sale and purchase of stocks, which were purchased or sold in the usual way, as above stated, on the New York Stock Exchange. In each case there was a [illegible] purchase or sale of the stocks as ordered, which was actually delivered on the following day under the usual usage followed on the New York Exchange, and for each transaction Simons, Hoy & Company mailed to R. Upjohn under date of June 12th, and to M. or Milton Upjohn after that date, a written confirmation of the purchase or sale, and at the end of each month a complete statement of the account showing all transactions had during the month, the date of each, the description of the stock, the price, the [illegible] or sale, etc. These confirmations were received and no objection made to them by either Mary or Mrs. Upjohn. All issues concerning what the account had been transferred on the books as personal in the name of Mrs. Upjohn, is not a party to this suit.

Upon confirmation contained the terms under which the purchases were made, and failing to [illegible] the right to sell the securities at public or private sale without notice when such sale was deemed necessary for the complete protection, and also the right to close out transactions when protection was endangered or to merely go on to endorse the account with such company. Pursuant to such authorizing clause, Mr. Upjohn [illegible] in question to the several purchase confirmations. The total [illegible] balance against R. Upjohn at the time the collateral was

sold was about $21,730.89, which included an indebtedness of $11,115.70 to Marcuse & Co., that was paid by Simons, Day & Company, as aforesaid. After satisfying such indebtedness from the sale of the collateral there remained in the possession of Simons, Day & Company $505.59, which the master found belonged to M. Spiegel, and that said company was not in any way indebted for any amount due said Rose Spiegel.

We have fully examined the evidence from which the master deduces the facts as above stated and find no occasion to differ from his conclusions. It would, therefore, subserve no useful purpose to review the testimony itself or detail more fully the various phases of the transactions. The burden of proof was upon complainant to prove that the transactions were illegal, and while there was conflicting testimony relating to the interviews had with reference to initiating the transactions it is very clear to our minds that the evidence amply sustains the master's conclusions. Hence the authorities cited by plaintiff in error relating to our statutes on gambling contracts have no application to the facts of this case.

Accordingly the decree will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

16 - 27567

(2878)

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LEONARD HICKS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Leonard Hicks, seeks to reverse a judgment of the Municipal Court of Chicago, entered December 1, 1921, wherein he was adjudged guilty of knowingly and willfully contributing to the delinquency of one Bernice Young, a girl of the age of 17 years, and was fined $200.

In the information it is charged that on November 17, 1921, the defendant contributed to the delinquency of said girl in that he unlawfully, knowingly and willfully "permitted her, the said Bernice Young, to have sexual relations with men in a house under his control." Another information was filed on the same day, wherein similar charges were made against defendant for contributing to the delinquency of another girl, aged 17 years and named Mildred May Bishop. The defendant was arrested and, after he had pleaded not guilty and had executed a jury waiver in each case, the two cases were tried together before the court without a jury. In the Bishop case the defendant was also adjudged guilty and fined $200.

It appears from the evidence that on the evening in question the girls reserved a room in a Chicago hotel and later came, unescorted, and occupied the room and later entertained two men therein; that subsequently the manager of the

By this writ of error the defendant, Antonio Klein, seeks to reverse a judgment of the District Court of Delaware, entered December 1, 1922, whereby he was adjudged guilty of knowingly and willfully contributing to the delinquency of one Marcine Young, a girl of the age of 17 years, and was fined $500.

In the information it is charged that on November 17, 1921, the defendant contributed to the delinquency of said girl in that he unlawfully, knowingly and willfully "invited her, the said Marcine Young, to have sexual relations with men in a house under his control." Another information was filed on the same day, wherein similar charges were made against defendants for contributing to the delinquency of another girl, aged 17 years and owner filed any fines. The defendant was arrested and, after he had pleaded not guilty and had waived a jury trial in each case, the two cases were tried together before the Court without a jury. In the Judgment here the defendant was also adjudged guilty and fined $500.

It appears from the evidence that on the evening in question the girls reported a room in a Wilmington hotel and later came, unescorted, and occupied the room and later entertained men in the room, and accepted the room and later enter-

hotel was informed that the girls had been guilty of improper conduct with the men and directed them to leave the hotel, which they did; and that the first knowledge that defendant, the owner of the hotel, had of the occurrence was when, after the girls had left the hotel, the manager informed him of their removal from the hotel as undesirable occupants. We find no evidence in the record showing that defendant "knowingly and willfully" contributed to the delinquency of either girl. The State's Attorney, in his printed brief here filed, practically concedes this. There being no evidence of defendant's guilt as charged, and as under the law he is presumed innocent until proven guilty, the judgment must be reversed.

REVERSED.

Barnes, P. J., and Morrill, J., concur.

hotel was informed that the girls had been guilty of improper conduct with the men and directed them to leave the hotel, which they did; and that the first knowledge that defendant, the owner of the hotel, had of the occurrence was when, after the girls had left the hotel, the manager informed him of their removal from the hotel on unmentionable complaints. We find no evidence in the record showing that defendant "knowingly and willfully" contributed to the delinquency of either girl. The State's Attorney, in his private trial here filed, practically admits this. There being no evidence of defendant's guilt as charged, and as under the law he is presumed innocent until proven guilty, the judgment must be reversed.

REVERSED.

Barnes, P. J., and Morrill, J., concur.

17 - 27568

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. LEONARD HICKS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 1, 1921, the defendant after a trial before the court without a jury, was adjudged guilty of knowingly and willfully, on November 17, 1921, contributing to the delinquency of one Mildred May Bishop, a girl of the age of 17 years, and was fined $200. By this writ of error he seeks to reverse the judgment. For the reasons stated in an opinion this day filed in case No. 27567, the judgment is reversed.

REVERSED.

Barnes, P. J., and Morrill, J., concur.

87 - Jones

Appeal of Joseph Jones
Liability.

Defendant in error,

vs.

Plaintiff in error.

Plaintiff in error,

Defendant in error.

Error to
Superior Court
of Cobb County.

Plaintiff brought this action for damages against the defendant.

On December 2, 1911, the defendant after a trial before the court sitting as a jury, was adjudged guilty of knowingly and wilfully, on December 17, 1910, constructing in the Chattahoochee of the Atlanta Gas Company, a part of the gas of 17 pounds, and not Class (illegible). He then with of error he seeks to reverse the judgment. The the trial court in an opinion that the defendant error in the trial in view of, first, the judgment is reversed.

Judgment.

Jenkins, P. J., and Hill, J., concur.

43 - 27871

A. LINDSAY,
Appellee,

vs.

AMERICAN GLUE COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 220

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract, tried without a jury, the Municipal Court found the issues against the defendant, assessed plaintiff's damages at the sum of $67.75, and entered judgment in that amount against defendant, and this appeal followed.

Plaintiff's claim is for commissions alleged to be due on the sale of certain glue, while he was employed as defendant's salesman at Chicago, in the total sum of $216.91, on which defendant is entitled to a credit of $149.16, leaving a net balance of $67.75. It appeared on the trial that the amount of $216.91, as claimed, was made up of the following items:

	Date	Purchaser	Amount	Rate	Commission
(1)	March 15, 1921	Sears Roebuck & Co.	$3066.46	2%	$41.33
(2)	Apr. 22,	-do-	2749.70	1%	27.49
(3)	May 27,	-do-	3202.23	1%	32.02
(4)	Aug. 22,	-do-	3159.00	2%	63.18
(5)	Aug. 31, 1921, various other commissions (not in dispute)				52.89
					$216.91

Defendant admitted on the trial that on August 31, 1921, when plaintiff voluntarily left its employ as a salesman after many years of service, it owed him on his commission account the sum of $84.48, (being all of above item No. 5, $52.89, and one-half of item No. 4, or $31.59), but denied owing him any sum on items Nos. 1, 2 and 3. Defendant further claimed that its said indebtedness

In a fourth claim action in contract, filed without a jury, the Municipal Court found the issues against the defendant, received plaintiff's charges in the sum of $27.75, and entered judgment in that amount against defendant, and costs follows.

Plaintiff's claim is for commissions alleged to be due on the sale of certain plan, which he was employed on defendant's salesman at Chicago. In the total sum of $[illegible], on which defendant is entitled to a credit of $[illegible], leaving a net balance of $27.75. It appeared on the trial that the amount of $[illegible], as claimed, was made up of the following items:

Date	Purchaser	Amount	Commission
1) March 16, 1923	Henry Hoeksma & Co.	$[illegible]	$[illegible]
2) Apr. 20,	-do-	[illegible]	[illegible]
3) May 27,	-do-	[illegible]	[illegible]
4) Aug. 22,	-do-	[illegible]	[illegible]
5) Aug. 31, 1923, various other commissions (not in dispute)			[illegible]
		$[illegible]	$[illegible]

Defendant admitted on the trial (May on August 31, 1923, when plaintiff voluntarily left the employ of a salesman after many years of service, it owed him on his commission account the sum of $[illegible], [being all of items no. 5, $[illegible], and specially at item No. 4, or $[illegible]), but claimed being [illegible] and not by [illegible].

of $84.48 for commissions was more than off-set by plaintiff's admitted cash overdraft of $149.16, due it when he left its employ. Defendant, because of plaintiff's long service, did not seek by claim of set-off to recover any sum from him, but only endeavored to show that it was not indebted to him in any sum at the time of the commencement of the action on December 14, 1921.

Defendant is engaged in the business of manufacturing, purchasing and selling glue, isinglass, gelatine and similar articles, and is a Massachusetts corporation, having its principal office in the city of Boston, where one M. C. Wright was, during the years 1920 and 1921, general manager of sales. Defendant was duly licensed to do business in Illinois and during said years had a branch office in Chicago, and Frank W. Morrill was the district manager. Plaintiff was a salesman under Morrill's supervision. On October 1, 1920, defendant issued to all of its salesmen a circular letter, offering to pay them additional commissions, under certain conditions, on sales to new customers. In this letter it offered to pay them a 2% commission on sales of glue to new customers. The letter contained the following clause: "In case of any dispute or difference arising between the salesman and the local manager such disputes will be forwarded to the office of the district manager for final ruling, with the privilege of an appeal on the part of the salesman to the general manager if he is not satisfied."

Plaintiff, during the last few years of his employment, received under verbal agreement a drawing account of $175 per month, a certain bonus, and his expenses. On March 15, 1921, he made a sale for defendant of certain glue to Sears, Roebuck & Co., of Chicago, a new customer, at a price considerably under defendant's then existing list price, the quoting of which price was

of $24.42 for commissions was more than offset by plaintiff's admitted cash overpaid of $48.10, due it when he left the employ. Defendant, because of plaintiff's long service, did not seek by claim of set-off to recover any sum from him, but only endeavored to show that it was not indebted to him in any sum at the time of the commencement of the action on December 14, 1921.

Defendant is engaged in the business of manufacturing, purchasing and selling glue, isinglass, gelatine and similar articles, and is a Massachusetts corporation, having its principal office in the city of Boston, where one A. G. Wright was during the years 1920 and 1921, general manager of sales. Defendant was duly licensed to do business in Illinois and during said years had a branch office in Chicago, and Frank E. Merrill was the district manager. Plaintiff was a salesman under Merrill's supervision. On October 1, 1920, defendant issued to all of the salesmen a circular letter, offering to pay them additional commissions, under certain conditions, on sales to NEW customers. In this letter it offered to pay them a $1 commission on sales of glue to new customers. The letter contained the following clause: "In case of any dispute or difference arising between the salesman and the local manager such disputes will be referred to the office of the district manager for final ruling, at the privilege of an appeal on the part of the salesman to the general manager if he is not satisfied."

Plaintiff, during the last few years of his employment, received under verbal agreement a drawing account of $175 per month, a certain bonus, and his expenses. On March 15, 1921, he made a sale for defendant of certain glue to "Sears, Roebuck & Co., of Chicago, a new customer, at a price considerably under defendant's then existing list price, the sending of which price was

authorized by Morrill. Shortly after he turned in the order for the glue, but before it had been shipped on March 29, 1921, he had a conversation with Morrill regarding the amount of his commissions therefor, he claiming $41.33, or 2%. Morrill told him that, because of the cut price at which the sale was made he could not allow the claim, and that the matter would have to be referred to Wright, general manager, when he next came to Chicago from Boston. Morrill testified that plaintiff acquiesced in this suggestion. Subsequently when Wright was in Chicago, the matter was talked over between Wright and plaintiff, in Morrill's presence. Wright told plaintiff that, in view of said cut price, the company could not pay him a commission. Morrill testified that plaintiff acquiesced in the decision. Plaintiff testified that he did not acquiesce. The evidence, however, discloses that plaintiff was accustomed to render to defendant, through Morrill, on the last day of each month, a written statement of his sales during that month and the commissions claimed thereon. These monthly statements for the months of March to August were offered in evidence, but not admitted by the court. They appear in the bill of exceptions, showing that the respective amounts of the commissions claimed therein were subsequently paid to plaintiff. In none of these statements is there any claim made by plaintiff for commissions on said sale of March 15, 1921, and plaintiff further testified that he made no further claim therefor, after Wright's said decision, until some time subsequent to his leaving defendant's employ.

Morrill further testified in substance that subsequent to Wright's said decision, and before plaintiff had turned in his April orders, he had a conversation with plaintiff regarding his commissions on future sales made to Sears Roebuck & Co., or other new customers, where the prices quoted were below the company's

authorized by Morrill. Shortly after he turned in the order for the glue, but before it had been shipped on March 20, 1921, he had a conversation with Morrill regarding the amount of his commissions thereby, he stating, "Mr. Morrill said, 'Mr. Wright, because of the cut price at which the sale was made he would not allow the claim, and that the matter would have to be referred to Wright, General Manager, when he next came to Chicago from Boston. Morrill testified that plaintiff acquiesced in this suggestion. Subsequently when Wright was in Chicago, the matter was talked over between Wright and plaintiff, in Morrill's presence. Wright told plaintiff that, in view of said cut price, the company could not pay him a commission. Morrill testified that plaintiff acquiesced in the decision. Plaintiff testified that he did not acquiesce. The evidence, however, discloses that plaintiff was accustomed to render to defendant, through Morrill, on the last day of each month, a written statement of his sales during that month and the commissions claimed thereon. These monthly statements for the months of March August were offered in evidence, but not admitted by the court. They appear in the bill of exceptions, showing that the respective amounts of the commissions claimed thereon were subsequently paid to plaintiff. In none of these statements is there any claim made by plaintiff for commissions on said sale of March 18, 1921, and plaintiff further testified that he made no further claim thereafter, after Wright's said decision, until some time subsequent to his leaving defendant's employ.

Morrill further testified to substance that subsequent to Wright's said decision, and before plaintiff had turned in his April orders, he had a conversation with plaintiff regarding his commissions on future sales made to Sears Roebuck & Co., or other new customers, where the prices quoted were below the company's

list price; that he told plaintiff that he would be allowed a commission of 1%, instead of 2% on such sales; that plaintiff thereupon said that he would take the 1%; that thereafter plaintiff, in making out his usual monthly written statements of such sales made, and commissions due him therefor, placed the rate of commission due at 1%; and that thereafter he received payment from the company accordingly. Plaintiff, while admitting that he had some such conversation with Morrill, denied that he had ever agreed with Morrill that he would take, or be satisfied with, only 1% commission on such sales. On April 22 and May 27, 1921, he made two more sales of glue to Sears, Roebuck & Co. (items Nos. 2 and 3, above) at prices below the company's then existing list price. In his written statement for the month of May, 1921, rendered to defendant, both of these sales appear, and also that he only claimed 1% as commissions therefor. This statement was offered in evidence by defendant, but the court, erroneously we think, refused its admission. It further appears that plaintiff's claim for commissions on such two sales at 1%, and for commissions on other sales during the month of May, was thereafter paid him. The payment was made by defendant's voucher-check, which plaintiff endorsed and cashed, and by the wording of said endorsement plaintiff accepted said check "in full of the within account." He now claims an additional 1% on such sales, although at no time while in defendant's employ did he make such claim. On August 22, 1921, he made another and similar sale of glue to Sears, Roebuck & Company (item No. 4, as above). The commission of 1% therefor was not paid him, because of his said overdraft.

After a careful examination of the present record we are of the opinion that the finding of the trial court, by which all of the above tabulated amounts were allowed to

list price; that he told plaintiff that he would be allowed a commission of 12, instead of 20 as such sales; that plaintiff thereupon said that he would take the 12; that thereafter plaintiff, in making out his usual monthly written statements of such sales made, and commissions due him thereon, placed the rate of commission due at 12; and that thereafter he received payment from the company accordingly. Plaintiff, while admitting that he had some such conversation with Merrill, denied that he had ever agreed with Merrill that he would take, or be satisfied with, only 12 commission on such sales. On April 22 and May 17, 1922, he made two more sales of glue to Jones, Newman & Co. (items Nos. 2 and 3, above) at prices below the company's then existing list price. In his written statement for the month of May, 1922, rendered to defendant, both of these sales appear, and also this in fact claimed 12 as commission therefor. This statement was offered in evidence by defendant, but the court, erroneously we think, refused its admission. It further appears that plaintiff's claim for commissions on such the sales at 12, and for commissions on other sales during the month of May, was thereafter paid him. The payments was made by defendant's voucher-check, which plaintiff endorsed and received, and by the receiving of said endorsement plaintiff recognized said check "in full of the within account." He now claims an additional 12 on such sales, although at the time while in defendant's employ did he make such claim. On August 22, 1921, he made another and similar sale of glue to Jones, Newman & Company (item No. 4, as above). The commission of 12 therefor was not paid him, because of his said overtrait.

After a careful consideration of the present record we are of the opinion that the finding of the trial court, by which all of the above immaterial remarks were allowed as

plaintiff as commissions, is not sustained by the evidence. We think it clear, under all the facts and circumstances disclosed, that plaintiff waived his right, if any he had, to said commissions, as claimed in said items Nos. 1, 2 and 3, and is not entitled to recover any part thereof from defendant. And, allowing plaintiff one-half of the amount claimed in item No. 4, and all of item No. 5, he is still a debtor of defendant, because of his said admitted overdraft of $149.16. The judgment of the Municipal Court should be reversed, and it is so ordered.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Morrill, J., concur.

plausibility as conclusions, is not justified by the evidence. We have if there, given all the facts and circumstances disclosed, that plausibility relied upon, right, if only be just, to such conclusions, as claimed in such times Sec. 1, 7 and 9, and is not violated by treaty or part thereof these arbitrators, and, allowing plausibility consistent of the -house shadow is step Sec. 9, the all of time Sec. 9, the is still a right of intercourse, because of his said unlimited operation of life-it. The judgment of the undersigned court ought be reversed, and it be so ordered.

Reversed with costs to appellant.

Barnes, J., (., not dissenting, J., dissent.

43 - 27871

FINDING OF FACTS.

We find as ultimate facts in this case that plaintiff, by his acts and conduct during his employment by defendant, waived his right, if any he had, to the commissions herein claimed by him, and that at the time of the commencement of the present action defendant was not indebted to him in any sum for commissions or otherwise.

52 - 27882

CITY OF CHICAGO,
Appellee,

vs.

MADISON SASH & DOOR COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered April 17, 1922, by the Municipal Court of Chicago against defendant, imposing a fine of $100 upon it for the alleged violation of an ordinance of the City of Chicago concerning licenses for lumber yards.

It is provided in section 1585 of the Municipal Code in part as follows:

> "No person or corporation shall keep, carry on, conduct or maintain a lumber yard, or other place where lumber is sold from yard, car, vessel or place, or where lumber is stored for the purpose of seasoning or drying the same, or where second-hand lumber is stored or kept for sale, without first having obtained a license therefor as hereinafter provided."

It is alleged in the City's statement of claim, filed March 29, 1922, that its claim is for a penalty, not exceeding $100, for a violation by defendant of said section, in that defendant, on February 11, 1922, and thereafter, at 4600-4612 W. Monroe street, within said city, did then and there "keep several stacks of lumber stored <u>for the purpose of seasoning or drying the same</u>, without first having obtained a license therefor."

The cause was tried without a jury, resulting in the court finding the defendant "guilty of a violation of the ordinance described in plaintiff's statement of claim," assessing a fine against it in the sum of $100, and entering

the judgment appealed from.

It appears from the evidence that defendant conducts its business of manufacturing and selling sashes and doors in large quantities on premises across the alley from the premises in question; that it has a license for the conducting of said business, but no license under the section of the ordinance mentioned; that defendant from time to time piles lumber on the premises in question so as to enable it to have a constant supply thereof for use in its factory; that the lumber so piled is not unseasoned lumber; that it is not there piled for the purpose of sale and is not there sold; and that it is not there piled or stored for the purpose of seasoning or drying it.

No printed brief and argument has been filed in this appellate court by the City. Defendant's counsel contend that the judgment is erroneous because the evidence does not show that defendant has kept or stored lumber on the premises in question "for the purpose of seasoning or drying the same." We agree with the contention. We find no evidence of defendant's violation of the ordinance as charged in the City's statement of claim. The judgment should be reversed, and it is so ordered.

REVERSED WITH FINDING OF FACT.

Barnes, P. J., and Morrill, J., concur.

52 - 28772

FINDING OF FACT.

We find as an ultimate fact in this case that the defendant, Madison Sash & Door Company, did not, at the times and on the premises mentioned in plaintiff's statement of claim, keep stacks or piles of lumber stored for the purpose of seasoning or drying the same.

12 - 27546

H. B. VAN ZWOLL, for use of LUMBERMEN'S MUTUAL CASUALTY COMPANY, a corporation, Plaintiff in Error, vs. H. PAULMAN & COMPANY, a corporation, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court of Chicago to recover the value of two spare automobile tires which were attached to an automobile delivered to defendant company and not returned on demand. The case was heard by the court without a jury. There was a finding and judgment in favor of defendant.

The affidavit of defense admitted the receipt of the tires but excused the failure to return them by alleging that while the automobile was in defendant's possession it was sent by it to another concern to be painted and that while the automobile was being returned to defendant's place of business, with due care for its safety, the spare tires were detached and stolen from the car by some unknown person.

The record shows that defendant, Paulman & Company, was the owner of a garage where it sold cars and accessories and where it stores, paints, washes, polishes and repairs automobiles. It handles a large number of cars and has numerous patrons. It employs about twenty-five people in the establishment, including a night watchman. The nominal plaintiff, Van Zwoll, had numerous business transactions with defendant company prior to the occurrence of the events involved herein. On February 16, 1921, Van Zwoll telephoned defendant company

Plaintiff in error brought suit in the Municipal Court of Chicago to recover the value of two opera automobile tires which were attached to an automobile delivered to defendant company and not returned on demand. The case was heard by the court without a jury. There was a finding and judgment in favor of defendant.

The sufficiency of defense admitted the receipt of the tires but excused the failure to return them by alleging that while the automobile was in defendant's possession it was sent by it to another concern to be painted and that while the automobile was being returned to defendant's place of business, with due care for its safety, the spare tires were stolen and stolen from the car by some strange person.

The record shows this statement, Williams & Company, was the owner of a garage where it sold cars and accessories and where it stored, rented, repaired, painted and repaired automobiles. It handles a large number of cars and has numerous patrons. It employs about twenty-five people in the establishment, including a night watchman. The contract plaintiff's van small, but requires maintaining expensive work equipment company prior to the occurrence of the events involved herein.

to send for his car and to repair the body of the car and do some painting on it. Defendant company sent an employee to Van Zwoll's office for the car, which was taken to defendant's place of business. The car was then sent by defendant to the Limousine Carriage Company for repairs. The latter company returned it to the Faulman Company, which retained the car in its garage for four or five weeks, during which Van Zwoll was absent from the city. Upon his return he directed defendant to send the car to his place of business, which was done.

At the time the car was delivered to defendant it was equipped with two spare tires on rims with covers. These tires were fastened to the automobile with a bar, locked with a Yale lock and could not be removed without the use of a key or the breaking of the lock. This key was in the car when taken by defendant company and the tires were on the car in question when the car was taken, but were not there when the car was returned. There were no indications that the lock was broken. The carrier and the lock holder were intact.

On discovering the loss of the tires and appurtenances Van Zwoll called at defendant's place of business and reported the loss. Defendant requested time for investigation, and later reported that the missing tires could not be found. Van Zwoll then replaced the missing tires at an expense of $140.82, for which he was reimbursed by the Lumbermen's Mutual Casualty Company under a theft clause in his policy of insurance on his car. Van Zwoll then assigned his claim to the Lumbermen's Mutual Casualty Company, which was subrogated to his rights. It is undisputed that the value of the tires is $140.82.

The record shows that the tires were on the machine when it was taken to the Limousine Carriage Company's place of business and when it was returned therefrom. Defendant's employees who brought the car from Van Zwoll's place of

to send for his car and to repair the body of the car and to have painting on it. Defendant company sent an employee to Van Zwell's office for the car, which was taken to defendant's place of business. The car was then sent by defendant to the Lincoln Garage Company for repairs. The latter company returned it to the Goodman Company, which retained the car in its garage for four or five weeks, during which time the car became from the city. Upon his return he directed defendant to send the car to his place of business, which was done.

At the time the car was delivered to defendant it was equipped with two spare tires on rims with covers. These tires were fastened to the automobile with a bar, locks with a Yale lock and could not be removed without the use of a key or the breaking of the lock. This key was in the carrier taken by defendant company and the tires were on the car in question when the car was taken, but were not there when the car was returned. There were no indications that the lock was broken. The carrier and the lock holder were intact.

On discovering the loss of the tires and equipment Van Zwell called at defendant's place of business and reported the loss. Defendant immediately the investigation, and later reported that the missing tires could not be found. He then replaced the missing tires at an expense of $140.00, for which he was reimbursed by the insurance's Mutual Casualty Company under a theft clause in his policy of insurance on his car. The Zwell Co. received his claim in the insurance's Casualty Company, which has subrogated to his rights. It is undisputed that the value of the tires is $140.00.

The record shows that the tires were on the vehicle when it was taken to the Lincoln Garage Company's place of business and when it was returned therefrom. Defendant's

business and returned it to Van Zwoll are unknown. An effort was made by defendant to find the missing tires and numerous inquiries were made. The defense to the claim is based upon the theory that the tires were stolen by some unknown person.

Defendant contends that it was liable only for failure to exercise ordinary care and that when it appears that the articles in question have been stolen or destroyed, the law will not presume negligence on the part of the bailee. While these propositions are undisputed, they do not apply in the case at bar for the reason that no theft of the tires has been proven. Where the defense is based upon the theory that the articles in question were stolen, it is essential that a theft should be proven. Stern v. Wilensky, 182 Ill. App. 417; McCurrie v. Hines Lumber Co., 178 id. 617. Theft cannot be proven by the mere fact that defendant was unable to find the tires. Facts should have been shown tending to prove a theft; otherwise the defendant is seeking to justify its failure to return the property by its inability to find the same.

The judgment of the Municipal Court is reversed with a finding of fact and judgment entered here for $140.82.

REVERSED WITH FINDING OF FACT
AND JUDGMENT HERE.

Barnes, P. J., and Gridley, J., concur.

machines and returned it to Van Ness are unknown. No effort was made by defendant to find the missing tires and numerous inquiries were made. The defense as the claim is based upon the theory that the tires were stolen by some unknown person.

Defendant contends that it was liable only for failure to exercise ordinary care and that when it appears that the articles in question have been stolen or destroyed, the law will not presume negligence on the part of the bailee. Until these propositions are undisputed, they is not apply in the case at bar for the reason that no proof of the theft has been given. Where the defense is based upon the theory that the articles in question were stolen, it is essential that a theft should be proven. Adams v. Palmer, 180 Ill. App. 417; Hathaway v. Adams Express Co., 178 Ia. 217. Theft cannot be proven by the mere fact that defendant was unable to find the tires. Theft should have been shown tending to prove a theft; otherwise the defendant is needing to justify its failure to return the property by its inability to find the same.

The judgment of the municipal court is reversed with a finding of fact and judgment entered here for $149.85.

REVERSED WITH FINDING OF FACT
AND JUDGMENT ENTERED.

Lewis, P. J., and Friedley, J., concur.

12 - 27546

FINDING OF FACT.

The court finds as an ultimate fact in this case that defendant did not exercise due care as a bailee for hire of the automobile and the tires attached to it.

70 - 27874

A. G. DICUS,
Appellant,

vs.

DAVID FUCHS, LENA FUCHS
and HUMBOLDT STATE BANK,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

Certiorari denied

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County in a partition suit. The decree, entered January 28, 1922, found that appellant and appellee Fuchs are the owners of certain real estate in Cook County, Illinois, subject to an incumbrance of $2200, each owning an undivided one-half interest therein, except that the share of appellant is subject to the lien of a judgment for $564.48, with interest and costs, recovered by appellee Humboldt State Bank against one Abraham Gross February 16, 1921, and directed that a partition be made on that basis and appointed commissioners for that purpose. The decree also found that complaint is not entitled to an allowance for solicitor's fees and that Lena Fuchs, who was a party defendant, has no interest in the premises and is barred from any right of dower or homestead therein. Complainant has appealed and seeks a reversal of the decree upon the ground that the trial court erred in refusing to allow solicitor's fees to him and in finding that his interest in the premises is subject to the lien of the judgment in favor of the Humboldt State Bank.

The record shows that the original bill was filed by one Abraham Gross, who is the judgment debtor of the Humboldt State Bank, on June 23, 1920. On that date he and the appellee David Fuchs are alleged to have been the owners in equal shares

This is an appeal from a decree of the circuit court of Cook County in a partition suit. The court, sitting January 28, 1920, found that appellant and appellee Brown are the owners of certain real estate in Cook County, Illinois, subject to an incumbrance of $2000, and subject to undivided one-half interest therein, except that the share of appellant is subject to the lien of a judgment for $964.48, with interest and costs, entered by appellee Lincoln State Bank against one Abraham Brown February 16, 1921, and directed that a partition be made on that basis and appointed commissioners for that purpose. The decree also found that complainant is not entitled to an allowance for solicitor's fees and that Lena Brown, who was a party defendant, has no interest in the premises and is barred from any right of dower or inheritance therein. Complainant has appealed and seeks a reversal of the decree upon the ground that the trial court erred in refusing to allow solicitor's fees to him and in finding that his interest in the premises is subject to the lien of the judgment in favor of the Lincoln State Bank.

The record shows that the original bill was filed by one Abraham Brown, who is the judgment debtor of the Lincoln State Bank, on June 29, 1920. On that date he and the appellee

of the premises in question. The present appellant, A. G. Dicus, appeared as solicitor for complainant. The Humboldt State Bank was not a party defendant to the original bill. On February 16, 1921, the bank obtained its judgment against Gross for $564.48 and costs. No further proceedings were had in the partition suit until June 16, 1921. On that date an order was entered substituting Dicus as complainant instead of Gross. Thereafter Dicus filed his amended and supplemental bill alleging the purchase by him from his former client Gross on July 6, 1920, of the latter's one-half interest in the property; that he has been in possession of the premises in question continuously since July 6, 1920, under the deed from said Gross and that the judgment in question is not a lien upon said premises but simply a cloud upon the title thereof, which should be removed. Appellant relies solely upon his possession as constituting notice of his rights in the property. The deed from Gross to Dicus was recorded April 15, 1921.

The statute on conveyances provides, in substance, that deeds shall take effect and be in force from and after the recording thereof and not before, as to all creditors and subsequent purchasers without notice, and that deeds are void as to all such creditors without notice until the same shall be filed for record. Cahill's Statutes, Chap. 30, Sec. 30. This has been the law of the state from the earliest times. The lien of a judgment attaches, in the absence of actual notice, not only to the interest which the judgment debtor may actually have in real estate, but to such interest as the record discloses in him. Thorpe v. Helmer, 275 Ill. 90. The record at the time of the rendition of the judgment showed Abraham Gross to be the owner of the real estate in question, subject to incumbrances shown of record.

of the premises in question. The present appellant, J. S. Olson, appeared as unlicensed for complainant. The Humboldt State Bank was not a party defendant to the original bill. On January 18, 1922, the bank obtained its judgment against Olsen for $[illegible] and costs. No further proceedings were had in the partition until March 16, 1922. On that date an order was entered substituting Olson as complainant instead of Olsen. Thereafter Olsen filed his answer and cross-bill alleging the purchase by him from his former client Olsen, on July 6, 1920, of the Lattor's one-half interest in the property; that he has been in possession of the premises in question continuously since July 6, 1920, under the deed from said Olsen and that the judgment in question is not a lien upon said premises but simply a cloud upon the title thereof, which should be removed. Appellant relies solely upon his possession as constituting notice of his rights in the property. The deed from Olsen to Olsen was recorded April 24, 1922.

The statute on conveyances provides, in substance, that deeds shall take effect and be in force from and after the recording thereof and not before, as to all creditors and subsequent purchasers without notice, and that deeds are void as to all such creditors without notice until the same shall be filed for record. Smith's Statutes, Chap. 30, Sec. 30. This has been the law of the state from the earliest times. The lien of a judgment attaches, in the absence of actual notice, not only to the interest which the judgment debtor may actually have in real estate, but to such interest as the records disclose in him. Thorpe v. Hickman, 270 Ill. 30. The record at the time of the rendition of the judgment showed Abraham Olsen to be the owner of the real estate in question, sub-

It has been held repeatedly that in order to protect a prior grantee of a judgment debtor, holding an unrecorded deed, the possession upon which such grantee relies must be open, visible and exclusive. Roderick v. McWeskin, 204 Ill. 630. Its character must be such as to arrest attention and put other persons claiming title upon inquiry. Travers v. McElvain, 181 id. 382; Davis v. Howard, 172 id. 340. The record in this case shows that at the time of the entry of the judgment in question February 16, 1921, the premises in question were occupied by appellee Fuchs and a certain tenant. In the negotiations which were conducted for the purpose of settling the original suit, Dicus appeared as counsel for said Gross and failed to disclose that he had any interest in the real estate, until the negotiations had failed on account of the existence of the judgment in question. The decree of the Circuit Court was correct in holding that the judgment was a lien upon the premises.

Appellant also contends that the Circuit Court erred in refusing to make him an allowance for solicitor's fees. The rights and interests of the parties to the suit were not set forth in such a way as to authorize such an allowance. The interests were not correctly alleged in the bill. For this reason no allowance for solicitor's fees would have been proper. The defense on the part of the bank was substantial. McTheny v. Bohn, 164 Ill. 495. It has been held that the statute does not permit the allowance of solicitor's fees in favor of parties who become complainants in a supplemental bill (McNemar v. McNemar, 143 Ill. App. 184), and that such an allowance cannot be made where the complainant is an attorney of record in the case. Cheney v. Hicks, 168 Ill. 533. The statute permitting the allowance of solicitor's fees to the complainant must be strictly construed.

It has been held repeatedly that in order to produce a prima facie case of a judgment lien, holding as aforesaid, the pecuniaries upon which such prima facie relies must be equal, viz. [illegible] v. [illegible], [illegible] 1[illegible]. The contrary must be made to be correct [illegible] but other persons claimed title upon [illegible], [illegible] v. [illegible], [illegible] 1[illegible]. [illegible] v. [illegible], 1[illegible] 1[illegible]. [illegible] recorded in this case show that at the time of the entry of the judgment in question February 1[illegible], the premises in question were occupied by appellee [illegible] and a certain [illegible]. In the negotiations which were undertaken for the purpose of settling the original suit, it was agreed on behalf of [illegible] and failed to disclose that he had any interest in the real estate, until the negotiations had failed on account of the [illegible] of the judgment in question. The [illegible] was correct in holding that the judgment was a lien upon the premises.

Appellant also contends that the circuit court erred in refusing to make the allowance for solicitors fees. The rights and interests of the parties in the suit were not set forth in such a way as to authorize such an allowance. The interests were not correctly alleged in the bill. For this reason no allowance for solicitor's fees could have been proper. The decree on the part of the bank was substantial. [illegible] v. [illegible], 1[illegible] 1[illegible]. 408. It has been held that the statute does not permit the allowance of solicitor's fees in favor of persons who have unsuccessfully in a suit [illegible] v. [illegible], 1[illegible] 1[illegible]. App. 1[illegible]), and that such an allowance cannot be made where the complainant in an attorney of course in the case. [illegible] v. [illegible], 1[illegible] 1[illegible]. 330. The statute permitting the allowance of solicitor's fees to the complainant must be strictly construed.

Gehrke v. Gehrke, 190 Ill. 186. Under these authorities as applied to the present case, the Circuit Court was fully justified in refusing an allowance of solicitor's fees.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

55 - 27887

MOTION PICTURE PATENTS COMPANY,
a Corporation,
Appellee,

vs.

ESSANAY FILM MANUFACTURING COMPANY,
a Corporation, and GEORGE K. SPOOR,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

221 I.A. 621

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for $1500 and costs entered April 22, 1922, against appellants, who were defendants, after a trial before the court without a jury. Plaintiff's claim is based upon an alleged oral agreement between the parties to this suit and others, whereby plaintiff was empowered and instructed to employ counsel and incur the expenses necessary to the defense of a certain suit against defendants and others, and defendants agreed to pay one-tenth of such expenditures, being $8975.19. The entire expenditure was $89,751.90. It is alleged that on April 17, 1918, the parties met, stated an account and agreed upon the sum then due from defendants, and there was then found to be due from defendants to plaintiff the sum of $4,000, upon which sum defendants paid $2500, leaving a balance of $1500 due and owing.

By their affidavit of merits defendants admitted the indebtedness of $1500 aforesaid, but alleged that the litigation in which the expense was incurred was based upon the ownership by plaintiff of certain patents for the manufacture of motion picture films and the machinery used therein, under which plaintiff had granted defendants the sole and exclusive right to manufacture such films and to use the machinery for that purpose; that plaintiff agreed to protect and hold defend-

ants harmless from the use of the articles by others and at its expense to prosecute all infringements; that in the year 1910 defendants advised plaintiff that certain persons were using the films and machinery, whereupon plaintiff authorized and directed defendants to secure evidence of such infringements and agreed to reimburse defendants for their expenses in that behalf. Defendants further averred that pursuant to this agreement, they secured such evidence, and in so doing expended $2031.30 prior to December 1, 1910; that these expenditures were reported to plaintiff and that plaintiff undertook, agreed and promised to reimburse defendants for said expenditures, which they have not done and therefore plaintiff is indebted to defendants in the sum of $2031.30, with interest thereon from the date of the expenditures.

Defendants also filed a claim of set-off, in which they alleged substantially the same matters as stated in their affidavit of merits and furnished an itemized account of the expenditures made by them in obtaining the evidence for plaintiff showing infringements of the patents and illegal use of the films and machinery mentioned in the contracts, and claimed that plaintiff is indebted to defendants for said sum of $2031.30, with interest thereon at five per cent per annum from the date of the expenditures, the last of which was made November 12, 1910. Plaintiff's affidavit of merits to defendants' set-off and counter-claim denied all the allegations of defendants' claim; averred that defendants' claim was barred by the statute of limitations of the State of New York and that the supposed cause of action mentioned in defendants' claim was taken into account and merged in the statement of the account between the parties on April 17, 1918, as alleged in plaintiff's amended

made herein from the use of the articles by others and at the expense to proceeds all infringements; that in the year 1910 defendants stated similar that certain actions were using the items and machinery, whereupon plaintiff authorized and directed defendants to secure evidence of such infringements and agreed to reimburse defendants for their expenses in that behalf. Defendants further asserted that pursuant to this agreement, they secured such evidence, and in so doing expended $2031.30 prior to December 1, 1910; that these expenditures were reported to plaintiff and that plaintiff authorized, ratified and promised to reimburse defendants for said expenditures, which they have not done and therefore plaintiff is indebted to defendants in the sum of $2031.30, with interest thereon from the date of the expenditures.

Defendants also filed a claim of set-off, in which they alleged substantially the same matters as stated in their affidavit of merits and furnished an itemized account of the expenditures made by them in obtaining the evidence for plaintiff showing infringements of the patents and illegal use of the files and machinery mentioned in the contract, and claimed that plaintiff is indebted to defendants for said sum of $2031.30, with interest thereon at five per cent per annum from the date of the expenditures, the last of which was made November 12, 1910. Plaintiff's affidavit of merits to defendants' set-off and counter-claim denied all the allegations of defendants' claim; averred that defendants' claim was barred by the statute of limitations of the State of New York and that the purported cause of action mentioned in defendants' claim was taken into account and merged in the judgment of the contract between the parties on April 17, 1918, as alleged in plaintiff's amended

statement of claim.

The indebtedness of $1500, for the recovery of which this suit was instituted, being admitted by defendants, the only questions for determination are those arising under defendants' claim of set-off. Three grounds of defense are presented by plaintiff to this claim, namely, (1) that defendants did not incur the expenses claimed upon the authorization or direction of plaintiff; (2) that defendants' claim is barred by the statute of limitations; and (3) that the supposed claim, if it ever existed, was merged in the statement of accounts between the parties on April 17, 1918. In the view which we take of the case, a discussion of the first two of these grounds of defense will be unnecessary.

It is admitted that in 1912 the parties to this action and certain licensees of plaintiff were made parties defendant in certain litigation and that they entered into an agreement among themselves to share pro rata the expenses of defending the action; that under this agreement the share of defendants in such expenses was fixed at one-tenth thereof; that the entire expenses of said litigation amounted to $89,751.90, of which defendants' share was $8975.19. This is undisputed. The record shows that on April 2, 1918, plaintiff wrote to defendants calling attention to the necessity of a settlement of the outstanding account, a statement of which had been sent to defendants January 25, 1918, showing a balance due to plaintiff of $5064.08. No objection whatever was made by defendants to the amount of the balance alleged to be due, and it is apparent from the correspondence between the two parties that allowances had been made by plaintiff to defendants for counter-charges amounting to approximately $4,000. From this

balance of $5064.06 established by the statement of the account mentioned, plaintiff offered to remit the sum of $50 paid by defendants "on censoring accounts," the sum of $625 royalty under defendants' license from December 1, 1915, to March 1, 1916, and a further sum of $389.06, leaving a net balance to be paid to plaintiff of $4,000. The letter stated that the proposition would remain open for acceptance until April 15, 1918, and would be withdrawn unless the entire amount was paid by that date or satisfactory arrangements concluded for the arrears of payments, and further stated that if not accepted, plaintiff would bring suit for the entire amount of defendants' share in the outlays made by plaintiff amounting to $8975.19. Defendants accepted this offer of settlement by their telegrams of April 15, 1918, in which they suggested a payment of $500 monthly, commencing May 1st, and of April 17, 1918, in which it was stated that their first remittance of $1,000 would be made May 1, 1918. On April 18, 1918, plaintiff, by telegram, signified its acceptance of these terms of payment, namely, $1,000 on May 1, 1918, and $500 on the first of each month thereafter until the entire sum had been paid.

The subsequent correspondence between the parties indicates that defendants did not meet these payments as agreed, although they made payments amounting to $1500 prior to August 17, 1918, leaving a balance of $2500 due. On that date and on September 14, 1918, they made payments of $500 each, leaving a balance due of $1500, the non-payment of which by defendants is admitted. No further payments being made by defendants, on February 5, 1919, plaintiff sent to defendants a dunning telegram, to which defendants replied to the effect that they would pay "just as quick as we get some money." It

appears from the foregoing that the total payments of $2500 were made during the year 1918. The present action was commenced about August 1, 1921. Shortly thereafter defendant spoke by telegram requested plaintiff to accept notes for the balance of $1500 due and requested the dismissal of the suits. This offer was refused by plaintiff.

These facts fully establish plaintiff's contention that there was an account stated between the parties on April 17, 1918, whereby defendants' indebtedness to plaintiff was fixed at $4,000. All items of alleged indebtedness covered by defendants' claim of set-off existed for many years prior to that date, and it must be assumed that they were taken into consideration when the account was stated between the parties. It must be presumed that the general settlement of accounts between the parties included all items which each party asserted against the other. The burden was upon defendants of showing that any item claimed by it was excepted from such settlement. Bull v. Harris, 31 Ill. 487; Straubher v. Kohler, 80 id. 21; McDavid v. Ellis, 78 Ill. App. 381. It is well established that a voluntary settlement of accounts between parties warrants the presumption that the settlement included all items properly chargeable at the time. While this presumption is not conclusive, there must be clear and convincing proof that items upon which a subsequent claim is based were unintentionally or by consent omitted from the settlement.

We find no argument advanced on behalf of defendants to the contrary and no evidence whatever furnished that the charges mentioned in its claim of set-off were omitted from the settlement of April 17, 1918. If any such claim existed, it seems reasonable to assume that it would have been asserted between April, 1918, when the settlement was made, and August

appears from the foregoing that the total payments of $[illegible] were made during the year 1930. The previous action was commenced about August 5, 1932. Thereby therefor defendants upon by telegram requested plaintiff to accept notes for the balance of $1,500 due and requested the discount of the drafts. This offer was refused by plaintiff.

Under Pub. Util. Statutes §[illegible]: provides that there was no account stated between the parties on April 17, 1932, whereby defendants' indebtedness to plaintiff was fixed at $4,000. All items of alleged indebtedness presented by defendants' claim of set-off existed for many years prior to that date, and it must be assumed that they were taken into consideration when the account was stated between the parties. It must be presumed that the general settlement of accounts between the parties included all items which each party asserted against the other. The burden was upon defendants of showing that any item claimed by it was omitted from such settlement. Hall v. Hardy, 21 Ill. 67; Cheseldine v. Hatter, 96 id. 22; Edwards v. Fitts, 98 Ill. App. 308. It is well established that a voluntary settlement of accounts by parties carries the presumption that the settlement included all items properly chargeable at the time. Unless this presumption is not conclusive, there must be clear and convincing proof that items then held by a subsequent claim in dispute were intentionally or by general omitted from the settlement.

It has no argument worthy on behalf of defendants in the contrary and no evidence whatever tending that the charge presented in the claim of set-off was omitted from the settlement of April 17, 1932. If one must guess reliable, it seems reasonable to assume that it would have been covered in [illegible] April, 1932, when the settlement was made, and [illegible]

1921, when the action was commenced, in view of the extended correspondence between the parties and the frequent promises of defendants to pay in accordance with the terms of settlement agreed upon.

Appellants' counsel argue that the affidavit of merits which plaintiff filed in reply to defendants' claim of set-off admitted plaintiff's liability to defendants for the sum of $2031.30 as claimed, and placed upon plaintiff the burden of proving the payment thereof. The language used by plaintiff in its affidavit of merits does not support the interpretation placed upon it by counsel for appellants. The allegation contained in the affidavit of merits to the effect that the supposed cause of action mentioned in defendants' claim was taken into account and merged in the settlement of accounts between them on April 17, 1918, was equivalent to saying that assuming defendants had a cause of action, it was included in the settlement. If we assume that plaintiff had the burden of proving payment of the sum of $2031.30 claimed by defendants, we think that the settlement agreed upon between the parties April 17, 1918, and subsequently accepted and acted upon by defendants relieved plaintiff of the necessity of furnishing any further evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

72 - 27904

L. YUSKEVITZ,
Appellee,

vs.

COLONIAL FIRE UNDERWRITERS
OF THE NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD, CONNECTICUT,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in an action brought by appellee upon a policy insuring him against loss of his automobile by theft. There was a jury trial resulting in a verdict and judgment for $400 in favor of plaintiff, from which defendant has appealed.

Appellant in seeking a reversal contends that the actual value of the automobile was not proven; that proof of loss of the automobile was not furnished within sixty days after the alleged loss; that the evidence failed to show a compliance with the condition of the policy requiring that plaintiff's automobile should be equipped with a Ferry locking device; and that the judgment is contrary to the manifest weight of the evidence.

The statement of claim alleged that the value of the automobile in question was $450, which was not denied in the affidavit of defense. No further proof of value was necessary. Matters alleged in the statement of claim and not specifically denied in defendant's affidavit of merits are admitted. Berenzweig v. Kreoun, 188 Ill. App. 586; Hamill v. Watts, 180 id. 279. Appellant cannot complain of the absence of proof of such matters. Leonard Produce Co. v.

U. P. R. R. Co., 180 id. 415.

The policy required that in the event of loss the insured shall forthwith give written notice thereof and within sixty days thereafter render a written statement to the insurer, giving certain details concerning the loss. The evidence shows that the theft occurred October 6, 1920, and that on the following day the insured presented to the agents of the insurer a verified statement of this loss. This was received by the person in charge of appellant's claim department and no objections made to its sufficiency. Subsequently the claim department made a request in writing that appellee call and submit his bill of sale of the automobile and his policy. This was done and appellee stood ready to execute any further written proof of loss which might be required. No further correspondence of interviews between the parties took place. We think that appellant was furnished with such proof of loss as the policy required, and if the proof was insufficient in any respect, further requirements were waived.

The policy required that the insured automobile be equipped with a Perry locking device. Appellant asserts that this condition of the policy was not complied with. The record shows that appellee and another witness both testified that the automobile in question was so equipped. No witness testified to the contrary. There was some evidence tending to discredit appellee's testimony in this respect and the credibility of the corroborating witness was impaired to some extent on cross-examination. Appellant contends that on this account the evidence on the part of appellee as to the equipment of the car with a Perry locking device should be wholly disregarded. This contention cannot be sustained. We do not find that the judgment

[illegible] 1. [illegible], 180 [illegible]. 424.

The policy required that in the event of loss the insured shall institute suit within six months in the District and within six days thereafter issue a written statement to the insurer, giving certain details concerning the loss. The evidence shows that the theft occurred October 3, 1930, and that on the following day the insured presented to the agents of the insurer a verified statement of this loss. This was received by the person in charge of appellant's claim department and no objections made to its sufficiency. Subsequently the claim department made a request in writing that appellee call and submit his bill of sale of the automobile and his policy. This was done and appellee stood ready to produce any further written proof of loss which might be required. No further correspondence or interviews between the parties took place. [illegible] such proof of loss as the policy required, and if the proof was insufficient in any respect, further requirements were waived.

The policy provides that the insured automobile is equipped with a lock ignition system. Appellee asserts that this condition of the policy is not complied with. The record shows that appellee and another witness both testified that the automobile in question was so equipped. No witness testified to the contrary. There was some evidence showing be literally appellee's testimony in this respect and the credibility of the conflicting witnesses was impaired to some extent on cross-examination. Appellant contends that on this account the evidence on the part of appellee as to the equipment of the car with a key locking device should be wholly disregarded. This contention cannot be sustained. We do not find that the judgment

was contrary to the manifest weight of the evidence, and it is therefore affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

80 - 27912

MRS. CORDELIA MERCER,
Appellee,

vs.

NATIONAL ACCIDENT SOCIETY OF NEW YORK, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, brought suit in the Municipal Court of Chicago on an insurance policy issued by defendant, whereby it insured her against disability from sickness and agreed to pay her $60 per month in the event of illness for a period not exceeding six consecutive months upon compliance by the insured with the conditions of the policy. Upon a trial before the court without a jury there was a finding and judgment in favor of plaintiff for $90 and costs, from which defendant appealed.

It is urged as grounds for reversal that plaintiff failed to give notice of her illness as required by the policy and that the judgment in any event is excessive and should have been reduced to $12 on account of other insurance of a similar character held by plaintiff.

The policy provided for the payment of the indemnity in case the insured is disabled and continuously confined within the house and therein regularly and personally visited by a legally qualified physician at least once each seven days, by reason of illness that wholly and continuously disables and prevents the insured from attending to his or her business or occupation. It further required that written notice of sickness be given the insurer within ten days after the commencement of disability from such sickness. Plaintiff testified that

she became ill on or about June 1, 1921, but it does not appear from her testimony that she required or received the attendance of a physician until July 16, 1921. On that date she went to St. Luke's Hospital and remained there under the care of a physician until August 2, 1921. She testified that she was totally disabled for six weeks and that she gave notice to the company of her illness while she was in the hospital upon blanks which were filled out by the doctors at her bedside; that she was unable to leave her bed and to attend personally to the mailing of these notices and that this was done by the nurse in attendance upon her. She testified that she did not remember how many reports were mailed to the company while she was in the hospital. This testimony is not specifically denied by defendant, the only evidence on behalf of defendant being contained in the deposition of its secretary and general manager, who stated that on August 5, 1921, he received a letter from the insured dated at Chicago August 2, 1921, which was the first notification the company had of plaintiff's illness. We think there was sufficient evidence to justify the court in finding that notice was given as required by the policy.

With reference to the carrying by the insured of other similar insurance, the policy provided as follows:

> "If the insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving written notice to the Society, then in that case the Society shall be liable only for such portion of the indemnity promised, as the said indemnity bears to the total amount of like indemnity in all policies covering such losses and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined."

The record shows that the insured carried other insurance covering the same loss in two different companies, upon which she received a total indemnity of $13 per week for

who became ill on or about June 1, 1972, has at does not appear from her testimony that she required or received the attendance of a physician until July 24, 1972. On that date she went to St. John's Hospital and remained there under the care of a physician until August 3, 1972. She testified that she was totally disabled for six weeks and that she gave notice to the manager of her illness while she was in the hospital upon friends which was filled out by the nurses at her bedside; that she was unable to leave her bed and to attend personally to the mailing of these notices and that this was done by the nurse in attendance upon her. She testified that she did not receive her sick benefit check which she had mailed to the company while she was in the hospital. This testimony is not specifically rebutted by defendant. The only evidence on behalf of defendant being questions in the deposition of its agent Long and general manager, who stated that on August 3, 1972, he received a letter from the insured dated of 'Sunday August 2, 1972' which was the first notification the company had of plaintiff's illness. We think there was sufficient evidence to justify the court in finding that notice was given as required by the policy.

With reference to the argument by the insured of other policy provisions, the policy provides - Pleaded:

> "If the insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving written notice to the society, then it shall cause the society shall be liable only for such portion of the insured's provided, on the said insured's loss in the total amount of like insurance in all policies covering such losses and for the period of such part of the premium paid or shall cause the pro rata for the insured's time covered."

The record shows that the insured carried other insurance covering the same loss in the Liberty Mutual Insurance Company which she received a total amount of $22 per week for which the premium was $1.

six weeks. There is no pretense that she ever gave the society written notice thereof. Appellant therefore contends that under Paragraph 17 of the policy it is not liable for more than $2 per week for the six weeks of disability. This conclusion is not warranted by the above quoted provision of the policy. The evidence to the effect that appellee showed the additional policies to the person who collected her premium of $2.50 per month upon the policy involved herein does not justify the conclusion of appellee's counsel that there was a waiver by the society of the condition of the policy requiring written notice of other like insurance.

The language of paragraph 17 of the policy is plain and clearly applicable to the present case. Under it the society was obligated to pay its proportionate part of the entire indemnity of $28 per week under all policies and for the return of such part of the premium of $2.50 per month "as shall exceed the pro rata for the indemnity thus determined." The portion of the indemnity for which it was liable under paragraph 17 of the policy was about $48, and the part of the premium of $2.50 per month which it was obligated to return was about $14, making a total liability of $62. This computation is substantially correct, and if not absolutely accurate, the maxim "de minimis non curat lex" will apply.

Accordingly, the judgment of the Municipal Court is affirmed, provided appellee files a remittitur of $28 within ten days. Otherwise it is reversed and the case remanded.

AFFIRMED ON REMITTITUR.

Barnes, P. J., and Gridley, J., concur.

six weeks. There is no problem that has ever gone the society written notice thereof. Appellant therefore contends that under Paragraph II of the policy it is not liable for more than $5 per week for the six weeks of disability. This conclusion is not warranted by the above quoted provision of the policy. The evidence in the effect that appellee showed the additional policies to the person who collected her premium of $2.50 per month upon the policy involved herein was not justify the conclusion of appellee's counsel that there was a waiver by the society of the condition of the policy requiring written notice of other like insurance.

The language of paragraph II of the policy is plain and clearly applicable to the present case. Under it the society was obligated to pay its proportionate part of the weekly indemnity of $30 per week under all policies and for the return of such part of the premium of $2.50 per month "as shall exceed the pro rata for the indemnity then outstanding." The portion of the indemnity for which it was liable under paragraph II of the policy was about $15, and the part of the premium of $2.50 per month which it was obligated to return was about $1.4, making a total liability of $16. This computation is mathematically correct, and if not absolutely accurate, the maxim "de minimis non curat lex" will apply.

Accordingly, the judgment of the municipal court is affirmed, presiding Judge Tilles a dissenting. Decided ten days. Otherwise it is unnecessary for the court mentioned.

Hanson, P. J., and Gridley, J., concur.

89 - 27921

JOURDAN PACKING COMPANY, a corporation, Appellant, vs. SAMUEL CHAPMAN, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellant brought suit in the Municipal Court of Chicago to recover for goods, wares and merchandise alleged to have been sold and delivered by it on April 26, 1920, to defendants Samuel Chapman, Jacob Horwitz and Charles Cole, copartners doing business under the firm name of Co-Operative Packing Company, and further alleged an account stated between the parties on April 27, 1920, showing an indebtedness of $444.80 due to plaintiff. An affidavit of merits was filed by defendant Chapman denying all of plaintiff's averments. Defendant Cole was defaulted and defendant Horwitz was not served. There was a jury trial which resulted in a verdict and judgment in favor of defendants, from which plaintiff has appealed.

The evidence shows that in the early part of the year 1920 plaintiff made sundry sales of merchandise to defendants, doing business under the name of Co-Operative Packing Company, at 4547 South Ashland Avenue in Chicago. The last of these transactions took place April 26, 1920. The partnership between defendants was dissolved April 14, 1920, by the withdrawal of Chapman, who sold his interest to defendants Cole and Horwitz. Chapman gave a general but somewhat indefinite notice of the dissolution by publishing a notice in a Chicago evening paper on April 22 and 23, 1920, to the effect that he had sold his meat market at 4547 South Ashland Avenue, and would not be

"responsible for any debts contracted after April 21, 1920." This notice was never brought to the attention of plaintiff, who had no knowledge of the dissolution until April 27, 1920. The sale and delivery of the goods as alleged is undisputed.

Appellant contends that the partnership is presumed to continue as to persons accustomed to dealing with the firm and continuing to do so after the dissolution in the absence of actual notice to such persons of the dissolution. This contention is supported by numerous authorities, holding that a retiring partner can relieve himself from liability for firm obligations to persons accustomed to dealing with the firm and continuing to do so only by giving actual notice to such persons of his withdrawal from the firm. Arnold v. Hart, 176 Ill. 442; Holtgreve v. Wintker, 85 id. 470; McNeil & Higgins Co. v. Hamlet, 213 Ill. App. 501. The court should have granted plaintiff's motion for a new trial, as the evidence strongly tended to prove the liability of the original partners and no actual notice of the firm dissolution was given to or received by plaintiff.

The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

"reasonable for our fellow workmen after April 1, 1930."
This notice was never brought to the attention of plaintiff, who had no knowledge of the dissolution until April 27, 1930. The sale and delivery of the goods as alleged is undisputed.

Appellant contends that the partnership is presumed to continue as to persons accustomed to dealing with the firm and continuing to do so after the dissolution in the absence of actual notice to such persons of the dissolution. This contention is supported by numerous authorities, holding that a retiring partner can relieve himself from liability for firm obligations to persons accustomed to dealing with the firm and continuing to do so only by giving actual notice to such persons of his withdrawal from the firm. Arnold v. Hurt, 174 Ill. 449; McJunkin v. Whitney, 82 Ia. 670; Everett & Hutchins Co. v. Cowles, 111 Ill. 486, 492. The court in this case granted plaintiff's motion for a new trial, as the evidence strongly tended to prove the liability of the retired partner and no actual notice of the firm dissolution was given to or received by plaintiff.

The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Crabtree, J., concur.

114-27947

(28582)

ANNA MORRIS, Appellee, vs. MARTIN STRUTZ, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment by default for $1,000 in the Municipal Court of Chicago on March 1, 1922. A motion to vacate the judgment was made March 2, 1922, which was continued until March 3, 1922. On the latter date the motion was granted and the judgment set aside. Plaintiff has appealed from the order of March 3, 1922.

Under the Municipal Court Act this judgment was subject to be set aside on motion within thirty days after its rendition. Cahill's Statutes, Chapter 37, Paragraph 409. The order of March 3, 1922, vacating the judgment was not final and therefore not appealable.

The record shows that the appeal bond herein was signed as principal by plaintiff's attorney in his own name and was not executed by plaintiff herself either in person or by attorney.

The appeal must be dismissed for the reasons above indicated, and it is so ordered.

APPEAL DISMISSED.

Barnes, P. J., and Gridley, J., concur.

ANNA MOUTIS,

Appellee,

vs.

DORTIX MINOTS,

Appellee.

Appeals from
Municipal Court
of Dallas.

(4. Motion overruled; judgment for defendant.

Plaintiff recovered a judgment by default for $1,000 in the municipal court of Dallas on March 1, 1970. A motion to vacate the judgment was filed March 4, 1970, which was overruled April 2, 1970. In the latter part of the motion was stated that the judgment was void. Plaintiff has appealed from the order of March 2, 1970.

Upon the municipal court the motion contained was held to be not valid in setting aside default judgment for conditions. Tullis v. Jenkins, Chapter 37, Vernon's Ann. Tex. Civil Stat. of March 1, 1970, executing the judgment was not final and therefore not appealable.

The record shows that the original suit was filed on Jan. 1, 1970. Attorney in his own name and not as guardian of plaintiff, attorney in his own name and not as guardian of plaintiff herself either is defense or be liable.

The order must be dismissed for the reasons above indicated, and it is so ordered.

Appeal dismissed.

Dawson, J., J.s and Fielder, J., concur.

138 - 27090

THE NORTHERN TRUST COMPANY, Administrator of the estate of Mary F. Swartz, Deceased, Julia F. Hughes and Edwin J. Fort, Appellees,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
JOHN E. SWARTZ, CORA SWARTZ, and JOHN E. SWARTZ, Administrator de bonis non with the Will annexed of the Estate of Thomas B. Swartz, Deceased, Appellants.	

228 I.A. 229

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants, John E. Swartz and Cora A. Swartz, his wife, seek to reverse a decree of the Circuit Court of Cook County, setting aside gifts of bonds to the value of about $12,000.00, which Mary F. Swartz made to the said defendants, on the ground that at the time these gifts were made, Mary F. Swartz was mentally incompetent to make a gift.

Thomas B. Swartz, to whom we shall refer as Dr. Swartz, and Mary F. Swartz were husband and wife. Dr. Swartz died February 1, 1916, leaving a will in which he bequeathed all of his estate to his wife, but providing that in case she should not survive him, or in the event of her death within one year after his death, and as the result of an accident causing his own death, all his property should go to John E. Swartz, who was his brother.

Mary F. Swartz died in the latter part of September, 1916, without leaving a will. Her only heirs at law and next

of kin were her sister, Julia F. Hughes and her brother, Edwin J. Fort, both of them being complainants in the case at bar.

On March 14, 1916, Mary F. Swartz was appointed executrix of the estate of Mr. Swartz, by the Probate Court of Cook County. The gifts which the bill sought to set aside were made by Mary F. Swartz to her brother-in-law John H. Swartz and his wife Cora A. Swartz, in July, 1916.

In the course of the presentation of the evidence submitted to the court in behalf of the complainants, Mrs. Hughes and Mr. Fort, each took the stand and testified, over the objection of the defendants. The court admitted their testimony, subject to the objection. This ruling of the court has been assigned as error, the defendants contending that by virtue of the provisions of Section 2 of Chapter 51 of the Illinois Statutes, the complainants Mrs. Hughes and Mr. Fort were incompetent to testify to any matters except such as occurred after the death of Mrs. Swartz. In our opinion, there is nothing in the section of the statutes referred to, rendering these witnesses incompetent in any respect. Of course, Mrs. Hughes and Mr. Fort were both directly interested in the event of the suit at bar, and among the parties defendant was one who is defending as administrator of a deceased person, namely, John H. Swartz, Administrator de bonis non with the Will annexed, of the Estate of Thomas B. Swartz, Deceased. But, the statute does not apply to all cases where there are parties in interest as complainants or defendants, who are offered as witnesses, and there is some party, nominally on the other side of the case, defending or suing as an administrator. In order that the statute shall apply and render such parties in interest incompetent as to matters occurring prior

of the same day [illegible], Julia H. Hughes and [illegible] C. Hurt, all of them being complainants in the case at bar.

On March 16, 1916, Mary M. Morris was appointed executrix of the estate of Dr. Swartz, by the Probate Court of Cook County. The gifts which the bill seeks to set aside were made by Mary M. Morris to her co-defendants Thomas L. Swartz and his wife Rose L. Swartz, in July, 1916.

In the course of the presentation of the evidence submitted to the court in behalf of the complainants, Mrs. Hughes and Mr. Hurt, each took the stand and testified, over the objection of the defendants. The court admitted their testimony, subject to the objection. This ruling of the court has been assigned as error, the defendants contending that by virtue of the provisions of Section 2 of Chapter 51 of the Illinois Statutes, the complainants Mrs. Hughes and Mr. Hurt were incompetent to testify to any matters except such as occurred after the death of Mrs. Swartz. In our opinion, there is nothing in the section of the statutes referred to, rendering these witnesses incompetent in any respect. Of course, Mrs. Hughes and Mr. Hurt were both directly interested in the event of the suit at bar, and among the parties defendant was one [illegible] defending as administrator of a deceased person, namely, Mary M. Morris, administratrix <u>de bonis non</u> with the will annexed, of the estate of Thomas L. Swartz, deceased. But, the statute does not apply to all cases where [illegible] the adverse party is [illegible] of complainants or defendants, who are [illegible], and there is one party, [illegible], as [illegible] as an administrator. In order that the statute shall apply and render such [illegible]

[illegible]

to the death of the deceased person in question, it must appear that their interests are adverse to the interests of the estate, as the administrator of which the other party is suing or defending. As was said by our Supreme Court in Fleming v. Mills, 182 Ill. 464, 470: "The statute * * * relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of heirs or divisees as to the distribution of an estate in proceedings by which the estate itself is in no event to be reduced or impaired," quoting with approval from Rigg v. Carroll, 89 Ill. 205. In stating the theory of this statute, our Supreme Court further said that it was based on the proposition that, inasmuch as the mouth of the deceased is closed by death, the mouth of the living, "who asserts a claim against the dead" shall be closed by law. In re Estate of Maher, 210 Ill. 160, 170. In the case at bar, all of the property of Mr. Swartz, making up his Estate, was vested in his wife, and this made up part of the subject-matter of the gifts which she is alleged to have made to the defendants, John W. Swartz and his wife. It is the contention of the complainants that Mary W. Swartz was mentally incompetent to make those gifts and they seek to set them aside for that reason, thus restoring the property to the Estate of Mary F. Swartz, in which event, it would pass to the complainants, Mrs. Hughes and Mr. Fort, as her heirs at law. While these two witnesses, parties complainant, are parties in interest, their interest is not adverse to the Estate of Mr. Swartz nor to the Administrator of that Estate and they, therefore, are not rendered incompetent to testify by reason of any provision of Sec. 2 of the Evidence Act, because John W. Swartz was defending as administrator de bonis non with the will annexed of the Estate of Mr. Swartz.

On the other hand, in connection with the testimony submitted in behalf of the defendants, John E. Swartz and his wife took the stand and testified. The complainants objected to that testimony, except as it might relate to conversations or transactions which had previously been testified to by the adverse parties in interest, Mrs. Hughes and Mr. Fort, or to matters occurring after the death of Mary F. Swartz. The court also admitted this evidence, subject to objection, and in this we are of the opinion the court erred. Admittedly, John E. Swartz and Cora A. Swartz were parties to the suit and persons directly interested in its outcome. And, from the facts thus far referred to, it seems equally clear that their interest was directly adverse to the interests of the estate of Mary F. Swartz, deceased, the administrator of which was one of the parties suing. That being the case, they were incompetent to testify with the exception noted.

At the beginning of the hearing of this case, by the trial court, the complainants introduced in evidence certain interrogatories, which had been filed by them with their bill of complaint, and which they had called upon the defendants to answer; and also the answers thereto, duly filed by the defendants. In these answers the defendants set forth that on May 24, 1916, Mary F. Swartz, at the office of the Phospho-Albumen Company, which was a company in which Dr. Swartz and his brother, John E. Swartz, were engaged in business for many years prior to the doctor's death, handed Cora A. Swartz a package requesting her to put it in the safe as she did not like to have it in the house, and that, pursuant to this request, Cora A. Swartz did so; that on the following day, at the same place, Mary F. Swartz talked with John E. Swartz, telling him that the package she had given Cora A. Swartz the day before, contained $500.00 in

On the other hand, in connection with the testimony submitted in behalf of the defendants, John T. Swartz and his wife took the stand and testified. The contentions advanced by that testimony, stripped of all their relate to conversations and transactions which had previously been testified to by the adverse witnesses in detail, [illegible] matters concerning where the bonds others. Swartz. The court also admitted this evidence, subject to objection, and in this we are at the opinion the court erred. Admittedly, John T. Swartz and John A. Swartz were partners in the sale and purchase directly interested in the outcome. Yet, from the facts then for referred to, it seems equally clear that their interest was directly adverse to the interests of the estate of Mary F. Swartz, deceased, the administrator of which was one of the parties suing. That being the case, they were incompetent to testify with the respective [illegible].

In the beginning of the hearing of this case, by the trial court, the complainants introduced in evidence certain interrogatories, which had been filed by them with their bill of complaint, and which they had called upon the defendants to answer; and also the answers thereto, duly filed by the defendants. In these answers the defendants set forth that on July 24, 1919, Mary F. Swartz, at the office of the Fidelity-Citizens Company, which was a company in which Mr. Swartz and his brother, John H. Swartz, were engaged in business for many years prior to the [illegible] death, handed John A. Swartz a package containing her [illegible] to put it in the safe as she did not like to have it in the house. The [illegible], testified to this transaction, John A. Swartz did not, that on the following day, or the same time, Mary F. Swartz talked with John H. Swartz, telling him that the package was

currency and "is to be here if anything happens to me," to which John E. Swartz answered: "All right, Mary, I will take care of it;" that on the last mentioned day, when Mary F. Swartz was at the office of the Company, she asked John E. Swartz if he would do her a favor and he replied that he would do anything he could for her, whereupon, she said that she wanted to bring down her bonds and securities and leave them in his care, so that if anything happened to her at any time, they would be safe, and he would know what to do with them, to which he replied "All right.- If you will make out a list in your own hand writing and bring the list and securities to me, I will put them in my safety box in the bank;" that on the following day she brought these bonds and securities to John E. Swartz at the office of the Company, and put them in his possession, saying: "I want you to have these for use in your business and safe keeping, so that if anything happens to me they will be safe;" that on June 2, 1916, John E. Swartz talked with Mary F. Swartz, in her home, asking her what he should do with the $500.00 he had in the safe, and the latter told him to keep it until she wanted it, and that she further instructed him to put it in the bank in his own name.

Dr. and Mrs. Swartz lived in an apartment, in the City of Chicago, at the time of the doctor's death, and after that event, she continued to live in the same apartment, from February 1916, until June of that year, and during this time she was living alone and employing no help. On June 2, 1916, she went to visit her brother, Edwin J. Fort, at his home in Brooklyn, New York.

Under date of July 19, 1916, Mary F. Swartz, while in the east, wrote her sister-in-law, Cora A. Swartz, as follows:

ceremony and "is to be here if anything happens to me," to which John B. Swarts answered: "All right, Guy, I will take care of it;" that on the last mentioned day, when Guy B. Swarts was at the office of the Company, the added John E. Swarts if he would do her a favor and be residual heir in would be anything he could for her, whereupon, she said that she wanted to bring down her house and everything she owns then in his care, so that if anything happened to her as Guy Swarts, Guy would be safe, and he replied that he do this then, to which he replied "All right." If you will make out a list to your own writing and bring the list and consider it to me, I will put them in my safety box in the bank;" that on the following day she brought down some and conveyed to John E. Swarts at the office of the Company, and put them in his possession, saying: "I want you to have them for use in your business and safe keeping, so that if anything happens to me they will be safe;" that on June 8, 1926, John E. Swarts united with Guy E. Swarts, as his heir, saying that he should do with the [illegible] in his care safe, as his last and that she, by doing it would be [illegible] and that she [illegible] the [illegible].

Mr. and Mrs. Swarts lived as an apartment, in the City of Chicago, at the time of the decedent's death, and after that event, she continued to live in the same apartment, from January 1926, until June of that year, and during such time she was living alone and employed in Chicago. On June 8, 1926, she went to visit her brother, Edwin L. Fort, at his home in Brooklyn, New York.

Under date of July 20, 1926, Guy E. Swarts, while in the east, wrote her sister-in-law, John E. Swarts, as follows:

"My dear Sister Cora:-

I send you this note for the reason that after careful and deliberate consideration, I desire that the three One Thousand Dollar bonds, two Chicago City Railway and one Swift, which I own and which were bought with the life insurance which came to me at the death of my husband, the late Thomas B. Swartz, from the National Union, etc., be transferred to you, Cora E. Swartz, to have and to hold in fee simple forever. This policy was made payable direct to me, Mary F. Swartz, his wife, and so it seems to me is not a part of his estate, but belongs to me. Trusting that this transfer can be legally made without my presence, but on this order, and that it will be acceptable to you, I am, with sincere affection, your sister,

MARY F. SWARTZ."

Under date of July 24, 1916, Mary F. Swartz wrote her brother-in-law, John E. Swartz, the following letter:

"Huntington, L.I. New York.
July 24, 1916.

"Dear Brother:-

Since writing you the last time I have been thinking a great deal about the future and the disposition of my property. You may not know, but it is true, that since the death of our children the world has had few attractions for me, but because of my dear husband, I have kept up social relations to some extent; now that he is gone I have absolutely no desire to continue them at all. I have been thinking of taking a step that may not meet with your approval, but which I have talked over with brother Ed. and to which he expressed his entire approval, so it need not be a cause of any anxiety to you or your wife. My health is greatly improved, in fact is better than for five years or more, it is my desire to work at something. This may seem strange to people who do not understand what I have had to endure the last twelve years. I believe that steady employment is the only panacea for such sorrows as mine have been.

So long as I am well my needs are not great and I prefer to be unhampered. It was the desire of my husband to do for you and your wife in such a way as to insure you an independent living and provide for your future without robbing me. I did not quite understand it all at first but after some thought I have concluded that the property that I placed with you for safe keeping before I left home might better be given to you and your wife outright, on one condition, i.e. that if the time should come when I am unable to provide for my own needs, that you will do so and see to it that I am buried in the family lot in the place reserved for me between Irene and my husband.

Believing that you will be more than willing to grant this, and in consideration of the fact that the Phospho-Albumen business was transferred in entirety to you, it is my desire that the three $1,000 bonds which were bo't with the insurance from the National Union

My dear father Harry:-

I send you this note for the reason that after several and laborious consultations, I have decided that the three the Thousand Dollar bonds, the Indemnity Policy and the Will, which I saw one with more bought with the life insurance which came to me at the death of my husband, the late Robert A. Brazil, from the Imperial Union, etc., be transferred to you, Mrs. E. Brazil, to have and to hold in fee absolute forever. This policy and your receipts alright to me, Mary T. Jenkins, wife, and to it seems to me it was a part of his estate, but belongs to me. Trusting that this transfer can be legally made without my presence, but on this order, and that it will be acceptable to you, I am, with sincere affections, your sister,

Mary T. Brazil.

Under date of July 20, 1912, Mary T. Jenkins writes her brother-in-law, Jesse H. Brazil, the following letter:

'Springfield, Ill. Sat 1st.
July 20, 1912.

'Dear Brother:-

Since writing you the last time I have been thinking a great deal about the future and the disposition of my property. You may not know, but it is true, that since the death of our children the world has had few attractives for me, but because of my dear husband, I have kept up social relations in some manner; now that he is gone I have absolutely no desire to continue them at all. I have been thinking of taking a step that may not meet with your approval, but which I have talked over with brother Ed, and he which he approved his entire approval, as it need not be a cause of any anxiety to you or your wife. My health is greatly improved, in fact in better than for two years or more, it is my desire to move at something. This may seem strange to people who do not understand what I have had to endure the last twelve years. I believe that steady employment is the only measure for such stress as that has been.

So long as I am well my works has not grown and I prefer to be unencumbered. It was the desire of my husband to do for you and your wife in such a way as to insure you and independent living and provide for your future without robbing me. I did not quite understand it all at first but after that I thought I have acquainted that the property that I placed with you for safe keeping before I left home might better be used by you and your wife operating, as the situation, i.e. that if the time should come when I am able to provide for my own needs, that you will so do and as it is that I am boxed in the family lot in the place reserved for me between Irene and my husband.

Believing that you will be more than willing to grant this, and in consideration of the fact that the Sangamo-Illinois business, was transferred in entirety to you, it is my good and the terms of the Bonds, Policy and Will, I am, with sincere affection, your sister,

Mary T. Brazil.'

Union, which policy was made payable to me direct, not to the estate, said three bonds being the two Chicago City Railway and one Swift, each $1000 bonds be given to your wife, Cora M. Swartz, in fee simple. In addition it is my desire that this be supplemented by the proceeds of three of the St.Lawrence Pulp and Lumber bonds which mature Feb. 1st, 1917. The remainder of said property - the bulk of which is represented by six other $1,000 bonds, is hereby given to you, John M. Swartz.

In explanation I desire you to understand that since the marriage of your brother and myself, my earnings by teaching in the public schools amounted to $3,000, and more, therefore I have considered that amount as my own and not an inheritance from him, and since this amount Six Thousand represents the woman's portion - this much shall be placed direct in her hands.

I am under no obligations to any one in the world; all claims against the estate of my late husband have been paid and I understand there is nothing to prevent my disposing of my own property in accordance with my own wishes, except that an accounting be made to the Judge of the Probate Court on the 14th of Mar. 1917.

My large trunk, sewing machine & a few other articles which you have in your possession please hold until further instructions. The clock, ship to H.B. Hoag, I have written to him in regard to it, the remainder to J. M. Hoag.

I do not yet know how long I shall be here but will let you know after a time.

With love,
Your sister,
Mary F. Swartz,
Executrix of the Estate of Thomas B. Swartz,
Deceased."

Under date of July 25, 1916, Cora A. Swartz replied to the letter written to her by Mary F. Swartz on July 19, as follows:

"Dear Sister Mary:-

I received your little note yesterday and to say that I was overwhelmed by your generosity is putting it very mildly. My first thought was that I could not accept such a magnificient present from you for fear that you might need it. Of course, it would be a very comfortable thing to have the feeling that I had a few thousands of my own in case anything happened to J.M. because if he were gone the business would go, too, and I would have nothing to keep me in my old age. After thinking the matter over, I would like to put it in this way: that I will accept the present from you with the understanding that the bonds will not be sold or disposed of and if at any time in the future you should need them, they will be returned to you intact. Otherwise, will be held for my personal use and thank you a thousand times for your great kindness in the matter. The legal part of it, J.M. will

talk over with Judge Blake tomorrow and see if anything is necessary beyond your letter. * * *

With lots of love, I am, as ever

Yours sister,

(Signed) Cora A. Swartz.

Under date of July 29, 1916, John E. Swartz replied to the letter from Mary F. Swartz, dated July 24, as follows:

"July 29, 1916.

Mrs. Mary F. Swartz,
Brooklyn, N.Y.

Dear Sister:-

I received your letter of the 24th and to say that I was surprised is putting it mildly. I did not answer immediately as I thought it best to think the matter over thoroughly and also get some competent advice on same before answering. I assure you that I appreciate your kindness and generosity very much and after thinking the matter over and talking with Judge Blake on it, I came to the conclusion that I could accept your offer and would comply fully with your wishes in the matter to the best of my ability and will be only too glad to be able to do anything that I can for you in any way that will make you feel happier and, at the same time will give you as little worry as possible. Judge Blake said he would fix up the papers according to your directions and wishes in the matter, and would send them to you for your approval if you still thought that was the proper thing to do. At the same time, I want you to understand that the securities and all property belonging to you will have my careful attention and at any time that you may need any of it, I will cheerfully turn same over to you. I will also agree to fulfill all your wishes as said before and at any time that you would like to see me or need any assistance in any way, I would be very glad to come wherever you are and do the best I can to make you comfortable and happy. I will await your answer before having Judge Blake draw up such papers as he thinks are necessary for our mutual protection.

We are nearly through with your apartment and will send you a report on same just as soon as I can get things straightened out. In the meantime, as I said before, I have close to a thousand dollars in the bank of your money. It is drawing 3% interest and if, at any time, you need any of this money, if you will kindly let me know when and how much, I will be pleased to send same to you. I want you to feel that in me you have a brother that will do anything for you that is possible to save you trouble and worry of any kind. * * *

Again assuring you that Cora and I will do anything that we can to please you and thanking you for your kindness to us, I am, as ever

Your affectionate brother,

John E. Swartz."

talk over with Judge Blake tomorrow and see if anything is necessary beyond your letter. * * *

With lots of love, I am, as ever

Your sister,

(Signed) Jane A. Swartz.

Jane Jane of July 24, 1924, from J. Swartz to-

piece to the letter from Mary E. Swartz, dated July 24, as follows:

-July 24, 1924.

Mrs. Mary E. Swartz,
Binghamton, N.Y.

Dear Sister:-

I received your letter of the 14th and in may that I was unyielded in putting it plainly. I did not answer immediately as I thought it best to think the matter over thoroughly and also get some lawyer-advice to some before answering. I assure you that I appreciate your kindness and generally very much and after thinking the matter over and talking with Judge Blake on it, I come to the conclusion that I could accept your offer and would comply fully with your wishes in the matter to the best of my ability and will be only too glad to be able to do anything that I can for you in any way that will make you feel happier and, at the same time will give you as little worry as possible. Judge Blake says he would fix up the papers according to your directions and wishes in the matter, and would come to you for your approval if you still thought that was the proper thing to do. At the same time, I want you to understand that the securities and all property belonging to you will have my careful attention and at any time that you may need any of it, I will cheerfully turn same over to you. I will also agree to fulfill all your wishes as said before and at any time that you would like to see me or need my assistance in any way, I would be very glad to come whenever you are and do the best I can to make you comfortable and happy. I will await your answer before having Judge Blake draw up such papers as he thinks are necessary for our mutual protection.

The one result which you expressed and will ever a trouble do you just as bad as I am get things straightened out. In the meantime, as I said before, I have close to a thousand dollars in the bank of your money. It is standing at interest and it, at any time, you need any of this money, if you will simply let me know what and how much, I will be pleased to send some to you. I want you to feel that in no way have a brother that will do anything for you that is possible to have you treated and waited of any kind. * * *

Again assuring you that Jane and I will do anything that we can to please you and thanking you for your kindness to us, I am, as ever

Your affectionate brother,

It is the contention of the complainants in support of the decree appealed from, that even though Mary F. Swartz be considered of sound mind, there were no completed gifts from her to John E. Swartz and his wife Cora A. Swartz, covering the property in question; that the letters and correspondence are not sufficient to accomplish such gifts to either of the defendants; that there was no proper and adequate acceptance of the alleged gifts on the part of the defendants, and that there was no delivery of the subject-matter of the alleged gift to Cora A. Swartz, to her during the lifetime of Mary F. Swartz, and that, for these reasons, it must be held that the gifts were not consummated.

Assuming the mental capacity of Mary F. Swartz to make the gifts in question, we are of the opinion that they were fully consummated. By her letter of July 24, Mrs. Swartz "hereby" gives to Cora A. Swartz and John E. Swartz, "the property that I placed with you for safe keeping before I left home." The condition imposed by Mrs. Swartz in that letter, was in no sense a condition precedent. She does not say that she makes the gifts "to you and your wife" on the condition that they will agree to do something, but rather on the condition that they will do something. The condition imposed is a condition subsequent. Nothing whatever is said in the letter to indicate that her intention was that title to the property was not to pass, unless or until the donees entered into a contract to provide for the donor during her life time, and bury her body in compliance with her expressed wishes, after her death. On the contrary, in writing John E. Swartz, Mrs. Swartz says that she has concluded to give the property in question, "to you and your wife outright", on the condition

It is the contention of the complainants in support of the bonds appealed from, that even though Mary T. Swartz be considered of sound mind, there were no acceptable gifts from her to John E. Swartz and his wife Mrs. A. Swartz, inasmuch the property in question; that the delivery and acceptance were not sufficient to accomplish such gifts to either of the defendants; that there was no proper and adequate acceptance of the alleged gifts on the part of the defendants, and that there was no delivery of the subject-matter of the alleged gift to Mrs A. Swartz, to not making the delivery of Mary T. Swartz, and that, for these reasons, it must be held that the gifts were not consummated.

Assuming the mental capacity of Mary T. Swartz to make the gifts in question, we are of the opinion that they were fully consummated. In the letter of July 24, Mrs. Swartz "Lovely" gives to Mrs A. Swartz and John E. Swartz, "the property that I placed with you for safe keeping before I left home." The condition imposed by Mrs. Swartz in that letter, was in no sense a condition precedent. She gave not any that she makes the gifts "to you and your wife" on the condition that they will agree to do something, but rather on the condition that they will do something. The condition imposed is a sanction subsequent. Nothing whatever is said in the letter to indicate that her intention was that gifts to the property was not to pass, unless or until the donees received from a stranger to provide for the home during her life time, and they had to complying with her suggested wishes, after her death. On the contrary, in writing John E. Swartz, Mrs. Swartz says that she has complied to give the property in question, "to you the gift with outright", on the condition

referred to, "believing you will be more than willing to grant this." That she intended to have the title of the property vest immediately in the donee is further shown, when, in referring to the part that is to go to John H. Swartz, after she has specified the bonds that are to go to Cora H. Swartz, she says: "The remainder, * * * is hereby given to you."

We regard the replies of Cora A. Swartz and John H. Swartz to the letters of Mrs. Swartz as unqualified acceptances of the gifts. In these replies they agree to the terms of the condition imposed on the gifts by the donor and assure her that the property will be kept in tact, and that they will meet any needs she may have and that the property will always be available for such purposes.

In order to constitute a valid gift in presenti, there must be an absolute delivery of the subject-matter of the gift without conditions, as to the vesting of the title, but a promise made by the donee, not as a condition affecting the delivery of the title, but pursuant thereto, and consistent with delivery, such as the payment of interest or annuities, does not invalidate the gift nor affect the passing of the title. This was the holding of our Supreme Court in Beatty v. Western College, 177 Ill. 280, where facts were involved which were analogous to those presented by the record in the case at bar. The court referred to a number of cases and among them, Young v. Young, 80 N.Y. 422, quoting from the latter case with approval as follows:

> "If an absolute delivery of the bonds to the donee, with intent to pass the title was made out, the donor reserving only the right to look to the donee for theinterest, the transaction may be sustained as an executed gift."

referred to, "believing you will be more than willing to grant this." That the intention is that the title of the property shall immediately [illegible] [illegible] [illegible], where, in referring to the cases that is to go to Miss A. Rhodes, after she has qualified the Board that she is to [illegible] C. Rhodes, she says: "The remainder, * * * is hereby given to you."

As regards the replies of Miss A. Rhodes and Miss A. Smith to the letters of Mrs. Rhodes as unqualified acceptances of the gifts. In those replies they agree to the terms of the conditions imposed on the gifts by the donor and assure her that the property will be kept in mind, and that they will make any [illegible] the [illegible] and that the property will always be available for such purposes.

In order to constitute a valid gift in praesenti, there must be an immediate delivery of the subject-matter of the gift without conditions, as in the [illegible] of the gifts, but a promise made by the donor, [illegible] [illegible] conditions affecting the delivery of the title, and [illegible] [illegible], and [illegible] with delivery, such as the payment of [illegible] or [illegible], does not invalidate the gift and affect the passing of the title. This was the holding of the Supreme Court of [illegible] in [illegible] Estate, 177 Ill. 395, where [illegible] [illegible] [illegible] [illegible] gift [illegible] was [illegible] by the [illegible] in the [illegible] of [illegible]. The court referred to a number of cases and among them, Hines v. Irwin, 95 N.Y. 511, quoting from the latter case [illegible] as follows:

> "If an [illegible] [illegible] of [illegible] [illegible] in the [illegible], [illegible] [illegible] to pass the title [illegible] [illegible], the donor [illegible], [illegible] the [illegible] [illegible] to the donee for [illegible], the [illegible] may be [illegible] as an executed gift."

In Seavey v. Seavey, 30 Ill. App. 625, the court quotes from Schoeler On Personal Property, with approval, as follows:

> "Certain reservations annexed to a gift by a donor have been deemed quite consistent with the purpose of gratuitous transfer. There may be a gift, notwithstanding the donor reserves the right to obtain or receive some kind of personal profit or benefit out of the transfer, as in the instance of a gift of money, with the reservation by way of interest."

We are of the opinion that under all the facts involved in the case at bar, after the writing of the letters of July 19 and 24, by Mrs. Swartz, the possession by John M. Swartz of the bonds given to his wife, was not the possession of an agent for the donor but of a trustee for the donee. At the time these gifts were made the property involved was already in the possession of John M. Swartz for safe keeping.

To constitute an effectual gift inter vivos, there must be delivery, but the delivery need not be an actual delivery to the donee, but it may be constructive. If, by the delivery made, the donor places the property which is the subject-matter of the gift, entirely out of her control, and clear intention is manifested that the subject-matter of the gift, in the hands of a third person is to be placed in the possession of the donee, by the former, there is a sufficient delivery. Such was the case of Seavey v. Seavey, supra, where the court held that the delivery of the notes by the donor to his son, to be, by the latter, divided between his two daughters, subject to the donor receiving the interest during his life, was a sufficient delivery to the daughters to constitute and effectual gift inter vivos. Counsel for the complainants call our attention to the case of Telford v. Patton, 144 Ill. 611,

In *Cooney* v. *Cooney*, 30 111. App. 598, the court quotes from Schouler on Personal Property, with approval, as follows:

> "Certain conditions exempt a gift by a donor from being deemed quite consistent with the purpose of gratuitous transfer. Where may be a gift, notwithstanding the donor preserves the right to obtain or receive some kind of personal benefit or benefit of one kind or another, as in the instance of a gift of money, with the reservation by way of interest."

We are of the opinion that under all the facts involved in the case at bar, after the writing of the letters of July 30 and 34, by Mrs. Smith, the possession by John H. Smith of the bonds given to his wife, was not the possession of an agent for the donor but of a trustee for the donee. As the time those gifts were made the property involved was already in the possession of John H. Smith for more years.

To constitute an effectual gift *inter vivos*, there must be delivery, but the delivery need not be an actual delivery to the donee, but it may be constructive. If, by the delivery made, the donor shows the property which is the subject-matter of the gift, in the hands of a third person as to be in fact in the possession of the donee, by the former, there is a sufficient delivery. Such was the case of *Cooney* v. *Cooney*, supra, where the court held that the delivery of the money by the donor to his son, to be, by the latter, divided between his two daughters, subject to the donor receiving the interest during his life, was a sufficient delivery to the donees to constitute an effectual gift *inter vivos*. Consent for the complainants will our authorities on the case of *Tuffley* v. *Tuffley*, 144 111. 611,

in which the court says:

> "Where a delivery is made to a third party, in order that the latter may deliver the subject of the gift to the donee as agent of the donor, the gift is not completed until there is an actual delivery to the donee; and, until the gift is completed by delivery, the donor can revoke the agent's authority and resume possession of the gift."

But, in the case at bar, Mrs. Swartz did not make delivery, of the bonds given to Cora A. Swartz, to John H. Swartz "in order that the latter may deliver the subject of the gift to the donee as agent of the donor." But the subject-matter of the gift being already in the possession of John H. Swartz for safe keeping, the donor, Mrs. Sartz, made an absolute and unequivocal gift of the six bonds in question to Cora A. Swartz, and by virtue of such gift, it became the duty of John H. Swartz to deliver these bonds to his wife, and until he did so he held them in trust for her. In the case last referred to, the court further says:

> "Where a delivery is to a third person as trustee for the donee, and not as agent for the donor, such delivery completes the gift, and the death of the donor will not revoke it; but, to make out such a case, the circumstances should show a full relinquishment of dominion over the property to the trustee for the purposes of the trust."

It is our opinion that, in the case at bar, the facts show such a complete relinquishment of dominion over the six bonds given to Cora A. Swartz, as to constitute John H. Swartz a trustee of those bonds for her, and a sufficient constructive delivery of the bonds to her as to constitute a complete gift <u>inter vivos</u> as to those bonds.

The main question involved on this appeal concerns the mental competency of Mrs. Swartz to make the gifts which the trial court set aside. In the decree appealed from, the

So which (the story says):

> "Where a delivery is made to a third party, in order that the bailor may delivery the subject of the gift to the donee on behalf of the donor, the gift is not completed until there is an actual delivery to the donee; and, until the gift is thus perfected by delivery, the donor has power the security notwithstanding and revocation of the gift."

But, in the case at bar, Mrs. Smith did not make delivery, of the house given to Mrs. A. Smith, to Mrs. B. Smith the proof that the [illegible] delivery the subject of the gift to the donee on behalf of the donor." But the [illegible] of the gift being already in her possession at the time Mrs. A. Smith made the donation of the house to Mrs. B. Smith, the donor, Mrs. A. Smith, made no delivery and transferred gift of the old house to Mrs. B. Smith, and by virtue of this gift, it became the duty of Mrs. B. Smith to deliver those bonds to her, and hold for life, or to hold them in trust for her. In the case [illegible] referred to, the court further says:

> "Where a delivery is to a third person on trustee for the donee, and not to or for the donor, good delivery completes the gift, and the death of the donor will not revoke it; but, to make out such a case, the evidence should show a full relinquishment and donation over the property to the trustee for the purpose of the trust."

If it is our opinion, in the case at bar, Mrs. Smith has made a complete relinquishment of ownership in the house given to Mrs. A. Smith, to Mrs. B. Smith a trustee of these bonds for her, and a sufficient delivery of the bonds to Mrs. B. Smith to constitute a complete gift inter vivos as to these bonds.

The case cited in Mr. Lee's brief involves the social relationship of Mrs. Smith to Mrs. [illegible]

court found that prior to July 19, 1916, and on that date, and at all times thereafter, until her death on September 22, 1916, Mrs. Swartz was dominated by the delusion that the Phospho-Albumen Co. needed money and was in financial difficulties and that John E. Swartz and Cora A. Swartz needed money, although there was, in fact, no basis for such ideas on her part; that Mrs. Swartz thought that the defendants John E. Swartz, and Cora A. Swartz, ought to have her money and that she should sacfifice it, and she was therefore dominated by the insane delusion that she should efface, depreciate and sacrifice herself, and that this delusion caused her to attempt to give and convey her property to the defendants. By the decree appealed from, the trial court canceled, set aside, and declared the gifts void because of the mental incapacity of the donor, Mary F. Swartz. It is the contention of the defendants in support of their appeal, that the evidence in the record is wholly insufficient to sustain the decree.

In commenting upon the law applicable to the facts involved in the case at bar, complainants invoke the rule applicable to the making of contracts, and contend that in order to establish the mental capacity of Mrs. Swartz to make the gifts in question, it must be shown that she was able to comprehend the meaning and effect of the transactions and that she was capable of exercising her will in connection with them. As held in Heiligenstein v. Schlotterbeck, 300 Ill. 296, the test of mental capacity necessary to make a valid deed, is that the grantor be capable of understanding in a reasonable manner the nature and effect of the act in which he is engaged. The deeds involved in that case were sought to be set aside, in part, on the ground of the mental incapacity, of the donor to execute them. They were not executed in connection with sales of the

court three days prior to July 22, 1918, and on that date, and at all times thereafter, until her death on September 20, 1919, Eva, Jessie was dominated by the defendants Ida Pingsgaard Hudson Jr. Rodney Young and Ida Pingsgaard Hutchinson and Ida, John K. Smith and John A. Hutchinson Young, although there was, in fact, no basis for such fears on her part; that Eva, Jessie Smith had her defendants John A. Smith, and Ida A. Smith, power to act for her during the last day world affairs if, you are now hereby instructed by the Lord Saturday that my whole client, Everybody was particular bar- mail, and that this division cannot for to attempt to give and money her trouble in his direction. In the latter instructions Eva, the in all those occasions, was below, and declared the right that person in the model community of the house, Eva E. Smith. It is the testimony of the defendants in support of their request, that the evidence in the record is wholly insufficient to sustain the issues.

In commenting upon the law applicable to the facts involved in the case at bar, respondents invoke the rule applicable to the making of contracts, and contend that it makes no difference the mental capacity of the. Jessie to make the gifts in question, it must be shown that she was unable to comprehend the meaning and effect of the transactions and that she was incapable of controlling the act in connection with them. As held in Hollingsworth v. Hollingsworth, 60 Ill. 101, the test of mental capacity necessary to make a valid deed, is that the grantor be capable of understanding in a reasonable manner the nature and effect of the act he makes to be engaged. The court instructed in that case were judged to be not valid, in part, on the ground of the mental incapacity, or weakness of mind.

property involved or similar transactions, but recited a consideration of one dollar and love and affection, and were in the nature of gifts. Similarly, there is no contract involved in the case at bar and in our opinion the test of mental capacity to be applied is the one laid down by the court in the case above cited. The burden of proof was of course upon the complainants, to show that the donor, Mrs. Swartz, was mentally incompetent to make the gifts at the time they were alleged to have been made.

Dr. and Mrs. Swartz had two children, both daughters. In December 1903, when those daughters were about fifteen and eighteen years of age, respectively, they, together with a sister of Mrs. Swartz, lost their lives in the Iroquois Theatre fire in Chicago. At the time of her death, the body of Mrs. Swartz was found in the Potomac River, near the Washington Estate at Mt. Vernon, Virginia.

The substance of the testimony submitted in behalf of complainants was as follows: Previous to the loss of her children, Mrs. Swartz had been strong, healthy and cheerful, but after that time she was quite depressed. Nort received a letter from Mrs. Swartz on May 7, 1916, in which she said she was sending him some bonds to put on the market through his bank or a broker, on the sale of which she expressed the hope of realizing about $5,000.00. She explains that it would not have been necessary to bother the witness but there had been "a little difficulty here which the business was passing through, making it advisable to hide this transaction for a short time." She assured him that there was no cause for worry and that nothing illegal had been done. She stated that she would send the bonds on the following Monday morning. Just before he received

[illegible] [illegible] or [illegible] transactions, has [illegible] a conclusion of one dollar one [illegible] effective, and were in the [illegible] of [illegible]. Similarly, there is no constant [illegible] red in one case at our end in our relation by [illegible] of [illegible] expected to be supplied in the one [illegible] down by the [illegible] in the case above cited. The [illegible] of proof was of course upon the complainants, so some [illegible] the [illegible], Jerik, was [illegible] [illegible] in such a [illegible] as to [illegible] [illegible] [illegible] [illegible] [illegible].

Mr. and Mrs. Harris had two children, both [illegible]. In December 1918, when these [illegible] were [illegible] [illegible] eighteen years of age, respectively, they, together with a sister of [illegible], Sarah, left their home in the [illegible] Theatre [illegible] in Chicago. At the time of her death, the body of Mrs. Harris was found in the Potomac River, near the Washington [illegible] at [illegible], Virginia.

The [illegible] of the testimony submitted in behalf of complainants may be [illegible]: Referring to the loss of her children, Mrs. Harris has been strong, healthy and [illegible], but after that time she was quite [illegible]. Her [illegible] a letter from him, [illegible] on May 7, 1919, in which she said she was [illegible] [illegible] [illegible] on the [illegible] through her back or a [illegible], on the [illegible] of which she [illegible] the hope of realizing about $3,000.00. She explains that it would not have been necessary to [illegible] the [illegible] but there had been a little difficulty here with the [illegible] [illegible] [illegible], making it advisable to make this transaction for a [illegible] time." The [illegible] has that [illegible] to [illegible] for [illegible] and that nothing illegal had been done. The [illegible] that she would [illegible] the bonds on the [illegible] [illegible]. Her [illegible] [illegible]

this letter Fort received two telegrams from his sister Mrs. Swartz, both dated the same day as the letter. The first asked him to raise $8,000.00 for her at 6% on the best security and the second advised him that $5,000.00 would be enough. A little later than this he received two telegrams, - one was dated May 29, and was as follows:

> "Dr. Holmes and Judge Blake say Mary must be placed in an asylum, either public or private. You are the only one to make proper arrangements.
> LESTER P. HOAG."

The second one was not dated. It reads as follows:

> "Mary's mental condition worse. We think it necessary that you come at once.
> Mr. Lester P. Hoag,
> J. W. Swartz."

Hoag was a distant cousin of the witness and his sister Mary F. Swartz. Fort testified that on receipt of these telegrams, he went to Chicago, arriving on May 30; that he went to the office of John W. Swartz, who told him that the mental condition of Mrs. Swartz was very bad, and he was afraid she might do something desperate and that he had a man go to her flat frequently to keep an eye on her and see that she did not injure herself. He testified that Mrs. Cora A. Swartz was present during part of this conversation, and that John W. Swartz further told him on this occasion that Mrs. Swartz had recently been to the office with a package of money, insisting that Cora A. Swartz was in serious trouble and that she brought the money and gave it to her to help her out of the trouble. The witness further testified that Mrs. Swartz never sent him the bonds referred to in her letter of May 27; that when he reached Chicago she explained that it had been impressed upon her that "I did very wrong when I sent them to you." Apparently,

this letter that received the telegram from his mighty son, Amelia, both before the noon day on the letter. The first robed him to raise $5,000.00 for her at 8% on the best security and his second advised him that $5,000.00 would be enough. A letter later that his so received the telegram, - one was dated July 29, and was as follows:

> "Dr. Mahone was unable to make any body want be placed in an asylum, either wealth or private. We are the only ones to make proper arrangements.
> Lucius E. Edge."

The second one was not dated. It reads as follows:

> "Mary's mental condition worse. Is quite
> it necessary that you come at once.
> Mr. Hunter R. Edge,
> C. C. Smith."

Long was a distant cousin of the Edges and his sister was F. Hunter. Just [illegible] was a resident of these telegrams, he went to Chicago, arriving on July 30; that he went to the office of John R. Hunter, who told him that the mental condition of Mrs. Hunter was very bad, and he was afraid she might do something desperate and have to be kept in an her first frequently to look on the [illegible] and did not [illegible] herself. Mr. Hunter [illegible] Mrs. Ione C. Smith was present during part of this conversation, and that John R. Hunter [illegible] to his sister Ione [illegible] Smith [illegible] recently been in an asylum with a passion or [illegible], insisting that Dave A. Hunter was in [illegible] and that she brought his money and [illegible] to [illegible] her out of the asylum. The witness further testified that Mrs. Hunter [illegible] the house referred to in her letter of July 27; that when he reached Chicago [illegible] that [illegible] see that "if she [illegible] when I [illegible] to you." Apparently,

by this remark, referring to the telegrams. At this time the witness stayed at the home of Mrs. Swartz until June 2nd. when she accompanied him back to his home in Brooklyn. During the time the witness was at her home, Mrs. Swartz told him that after her husband's death she had given her bonds and practically all of her property to John E. Swartz for safe keeping. The witness also testified that he had visited his sister early in April 1915 (presumably he meant 1916, for it was after the death of Mr. Swartz) and at that time his sister told him she was having trouble with John over her husband's estate; that the doctor wanted her to have an income from the Company of at least $50.00 a month, which would give her enough to live on with the income she might get from the property she had; that John claimed there was no income from the stock in the company, which she thought was not true because her husband has always drawn an income from the ebusiness; that she stated she thought that John was trying to over-reach her and get possession of her property and that he did not care if she wasunableto support herself as long as he got along. The witness identified a letter received from John E. Swartz, dated May 24, 1916, in which the latter says that for the past week his sister has not been in very good health; that one or two days she seemed to be off mentally; that the writer had attempted to have Mrs. Hughes come up from Valparaiso, but that she had not seen fit to come; that he would notify Fort if things grew worse and keep him posted, and he suggested that Fort write his sister and ask her to come and make him a visit; that Mrs. Swartz was better on the day the letter was written and that the writer had had a talk with her and she seemed to be all right again. In that letter John E. Swartz expressed the feeling that Mrs.Swartz ought not to be allowed

to remain in her apartment alone, but that she insisted on staying there; that he did not feel he ought to stand all the responsibility of her condition if she grew worse; that without her knowledge he had requested her physician to call and see her, which the physician did with the appearance of making a social call; that he found her much better but felt she ought not to be left alone. The witness testified that while his sister was at his home in Brooklyn, and later in Huntington, Long Island, she helped his wife with the housework, but was very quiet and reticent; that she always refused to meet anybody who called, and that she had no social intercourse with anybody, not even his family; that on two or three occasions when she overslept, she came down and said she had been locked in or she would have been down sooner; that the lock on her bedroom door was on the inside; that after she had been with the witness and his family for a short time she came to him, very much excited, and stated that she must leave immediately, although there had been no trouble; that she was not certain where she was going; that upon his insistence, she stated that she was going to a hotel in New York for a few days and then, perhaps, back to Chicago; that she had already packed her trunk; that he took her to the railroad station and she explained to him that she was not going into the city on the same train he was, and that she had a matter to attend to in the village, and that she wanted to see an old lady she had met there. She explained she was going into the city on the next train. On the following day at his office Fort received a letter from Mrs. Swartz, dated at Huntington, explaining that she had not gone into New York as she expected to but that she might remain at Huntington for some time, which "must be a secret between you and me." She explained in the letter that the only

to remain in her apartment alone, but that she insisted on staying there; that he did not feel he ought to assume all the responsibility of her condition if she grew worse; that without her knowledge he had requested her physician to call and see her, which the physician did with the appearance of making a social call; that he found her much better but felt she ought not to be left alone. The witness testified that while his sister was at his home in Brooklyn, and later in Huntington, Long Island, she helped his wife with the housework, but was very quiet and retiring; that she always refused to meet anybody who called, and that she had no social intercourse with anybody, not even his family; that on two or three occasions when she overslept, she came down and said she had been locked in or she would have been down sooner; that the lock on her bedroom door was on the inside; that after she had been with the witness and his family for a short time she came to him, very much excited, and stated that she must leave immediately, although there had been no trouble; that she was not certain where she was going; that upon his insistence, she stated that she was going to a hotel in New York for a few days and then, perhaps, back to Chicago; that she had already packed her trunk; that he took her to the railroad station and she explained to him that she was not going into the city on the same train he was, and that she had a matter to attend to in the village, and that she wanted to see an old lady who lived out there. She explained she was going into the city on the next train. On the following day at the train she telephone a letter from Mrs. Duerr, dated at Huntington, explaining that she had not gone into New York as she expected to but that she might remain at Huntington for some time, which must be a secret between her and her husband. She also stated that she had

thing which would call her to Chicago at that time would be the care of her apartment; that John and Cora were willing to look after that. She asked that her mail might continue to be directed to her brother's and forwarded by him to her at Huntington, L.I. On the day following this, the witness saw his sister and she told him where she was located, and explained that she was acting as a personal attendant to an elderly couple who were feeble and needed care. Another letter to her brother was introduced in evidence, dated July 7, 1916, in which she tells her brother more about the people she is staying with. She says that she is relieved to know that he does not feel that for her to take such a position has humiliated him; that housework is very healthful for her but that she will not keep it up long; that she cannot be content without work of some kind and before long will try to secure "such a position as you and I talked of." She assures her brother of her appreciation of his kindness, and that the few weeks spent at his home will be a memory full of joy as long as she lives. She mentions some articles of jewelry she wants to give the children and asks if they will be acceptable, then adding, "Speak plainly, for whatever is said will never be repeated"; she sends love to her brother's family and asks him to keep a goodly supply for himself as he is the nearest to her of anyone in this world. The witness testified that the position he and his sister had talked over was that of a matron in a hospital or something of that sort.

Under date of July 16, 1916, Mrs. Swartz wrote her brother, saying she wanted to see him on important business and asking him to name some time when it would be convenient for her to come to his office. Port testified that she called

a day or two later and urged her brother to join the Catholic Church, saying that she had been reading and studying with that in view. The witness expressed surprise, as Mrs. Swartz had always been a strong Presbyterian. The people she was then working for were not Catholics. The witness described with some detail the talk he had with his sister on this matter. There are also several letters from Mrs. Swartz to her brother in the record, in which she mentions this subject. In one of them she tells him that she "was too precipitate in making an absolute statement as to the step which I have been contemplating."

Under date of September 19, 1916, Fort received a letter from Mrs. Swartz referring to a letter which he had received from John E. Swartz about which Fort had written her, and saying that she thinks it is better to let it go as it is for awhile "I do not understand and told him so. I have decided to go home and find out." She then tells her brother in this letter that she is planning to leave Huntington on the following Tuesday, taking a train to the Pennsylvania Depot in New York, where she expects to go on, by way of Washington; that she understands that the trains make close connections in New York and that it would not be fair to ask him to come and see her. She again thanks him for his kindness, and makes reference to his children and family and other things. The letter from John E. Swartz to Fort, to which Mrs. Swartz makes reference and on which she makes some comment, was one dated September 14, 1916, in which John E. Swartz tells Fort that the last letter or two he has received from Mary had not been quite clear; that in one of them she asked J. E. Swartz to send her savings account, amounting to about $565.00 to Fort so that the latter could put it in a savings bank in the east

where he might have it for her use if she needed it. John E. Swartz explains that to withdraw the account immediately would occasion the loss of some interest but that he is willing to send it on if Fort thinks best. He also explains that some days previous he had received a box containing some of Mrs. Swartz' clothes, without any directions or explanations. Fort testified that about the time he received his sister's letter of September 19, she came in to see him and said that John E. Swartz had been writing her; that she did not know what he was doing or trying to do with her property and she was going to find out. Fort testified further that in the early part of August, 1916, his sister came to his office and wanted to borrow $100.00 right away, and he said he would send it to her. He did so the next day, and that morning he had a note from her finding fault with him for not keeping his promise. He testified that his sister gave him a note for the amount, although she never cashed the check.

Under date of July 15, 1916, Mrs. Swartz wrote a letter to John E. Swartz expressing her regret that certain bonds she had asked him to sell had not been disposed of. She adds, that since she needs more ready money very urgently, he may place on the market at once certain other bonds she mentions and which were among those left in his care before she went east, and forward the proceeds to her.

Under date of August 10, 1916, she wrote to John E. Swartz, saying that she had been somewhat under the weather but expected to be herself in a day or so, adding, "recently I have been in so much better health than before in several years, that I began to think that it was unnecessary to use any particular care." In this letter she also asks whether he thinks it would be right to send her savings account to

her brother, Edwin J. Fort, so that he may use it for her in case "sickness or other misfortune overtake me."

Under date of August 30, 1916, she wrote John E. Swartz another letter. She had heard from him that his wife had been ill but was improving and she says: "Should you need ready cash and there is any available of what I placed in your care, feel perfectly free to use it as you see fit.- two physicians and a nurse cause a good deal of expense, I realize. I am greatly improved in health since coming east.- am better in fact than in several years and feel sure that I am increasing in weight."

Complainants introduced in evidence the deposition of Rosalie Sammis, in whose employ Mrs. Swartz was after leaving the home of her brother in the summer of 1916. Mrs. Sammis testified that Mrs. Swartz called on her on June 28, 1916, and that at that time she engaged her as a house keeper; that Mrs. Swartz remained in the home of the witness in that capacity until September 20, 1916, receiving a compensation of $25.00 a month; that Mrs. Swartz was a model house keeper, doing all kinds of house work very intelligently; that on September 20, 1916, Mrs. Swartz said that it was imperative that she leave; that she said she was going to Washington; that during the time she lived with the witness she never said anything about her affairs, that her work was perfect, and that she never engaged in conversation except to ask the witness what she wanted done; that she was a perfect lady and that she never absented herself from the house; that no one called on her during that summer; that she wrote many letters and received many. This witness was not asked to give her opinion as to the mental condition of Mrs. Swartz, although it was during the time she was living with the witness that Mrs. Swartz wrote the letters pur-

porting to make the gifts in question.

The complainants called Cora A. Swartz as a witness and she testified that Mary F. Swartz did not owe her any money at any time after the death of Dr. Swartz.

Mrs. Hughes testified substantially the same as her brother did with regard to the condition of Mrs. Swartz before and after the loss of her children. Mrs. Swartz was in a sanitarium for several weeks in 1904, and Mrs. Hughes testified that she told her that while she was at the sanitarium the nurse had to take means to keep her in for she would have drowned herself, if she had had a chance; that she had nothing to live for since she lost her children. She further testified that at the time of the death of Dr. Swartz, his wife seemed to be entirely broken down; that she did not see her from that time until the last of May, at which time Mrs. Swartz called the witness up three times during the same night, after midnight, wanting to borrow $5,000.00, suggesting that the witness could mortgage her house or get the money from the bank and bring it to her the next morning; that on the following day she received a telegram from her sister reading: "You must come. I must see you"; that she went to Chicago and saw her sister that day and the latter wanted her to witness a paper to the effect that John E. Swartz was not capable of running the business of the company, and she asked the witness if she had brought the money she wanted, and the witness said she had not, whereupon, she wanted to know if she could not give her the $5,000.00 as soon as the witness got home, and added, that if she sent her $50.00 that would do; that she wanted the money to help Mrs. J. E. Swartz out of some trouble; that the witness asked her what the trouble was and she said she did not know; that

the witness did not see the paper above referred to; that Mrs. Swartz told her on the occasion of this visit, that she had read in the Chicago Examiner that the witness had said something against the character of Mrs. Swartz's deceased daughter, Margaret; that the witness told her that she had done nothing of the kind, whereupon, she said: "Well then, that's all right"; that Mrs. Swartz did not want the witness to stay longer than over night, but that she asked her to let her daughter, who had accompanied her mother, remain and that the witness returned home and her daughter remained until the following Wednesday. Mrs. Hughes had two sons in whom Mrs. Swartz seems to have taken an interest. Apparently she loaned her sister sums of fifty dollars on several occasions, and it also appears that she sent one of these sons similar amounts on one or two occasions. Mrs. Hughes testified that Cora A. Swartz told her that Mary F. Swartz never cared anything for her and she thought it strange that she should give her $3,000.00. The complainants offered in evidence a letter from Dr. Swartz to Mrs. Hughes, dated December 6, 1915, which was received in evidence over the objection of the defendants. In our opinion, it was clearly incompetent and should not have been admitted. Mrs. Hughes testified further that in December, 1915, up to which time Dr. Swartz had had in his possession $5,000.00, in bonds belonging to the witness, apparently for safe keeping, Mary F. Swartz wrote her and told her she was afraid to have the Doctor keep the bonds longer, and asked her to come up and get them. She also testified that Mrs. Swartz had been principal of a public school in Chicago for years; that she had no members of her own family living in Chicago, and that after her marriage she had always lived among her husband's relatives.

A Mrs. Ackers testified she had known Mrs. Swartz for 25 years, and had seen her once or twice a week up to 1908, when she moved away from Chicago, after which she came to Chicago every year; that after the loss of her children, she noticed Mrs. Swartz was getting very peculiar; that in talking of her children she said she thought they were doing the same things "up there as they would be doing on earth; that Marjorie would be going on with her music and Irene would be in school * * * That is about all I saw"; that she was a very reticent woman at all times about talking of herself or her children, both before and after the fire. This witness visited Mrs. Swartz at the time she was in the sanitarium, and she testified that at that time Mrs. Swartz, in the absence of the nurse, "looked out kind of crazy" and said they were going to take everything from Mr. Swartz and get everything he had, and were never going to let her out; that after she left the sanitarium and up to 1908, Mrs. Swartz was very melancholy; that she told the witness her only salvation was to do her own work and not have a servant,- that she could not sit down and think. Mrs. Swartz was a very active church woman, occupying the various offices in the Woman's Society at different times, and her activities in this connection seemed to increase rather than diminish after the loss of her children. Mrs. Ackers testified to a conversation which she had with her, in which she talked about the children,and where they might be, and the witness expressed the wish that she might be more sure of "the after life", and Mrs. Swartz replied: "I am; I know." She further testified that she saw Mrs. Swartz in the summer of 1914, probably twice, and that she then seemed to be getting stranger, but she could not name and particular thing; that her speech was

A.Mrs. Asbury testified she had known Mrs. Smarts for 25 years, and had seen her once or twice a week up to 1922, when she moved away from Orlando, after which she came to Orlando every year; that after the loss of her children, she noticed Mrs. Smarts was getting very peculiar; that in talking of her children she said she thought they were doing the same things "up there as they would be doing on earth; that Benjamin would be going on with her music and Irene would be in school * * * That is about all I know"; that she was a very religious woman at all times about talking of her-self or her children, both before and after the fire. This witness visited Mrs. Smarts at the time she was in the asylum, and she testified that at that time Mrs. Smarts, in the absence of the nurse, "looked out kind of crazy" and said they were going to take everything from Mr. Smarts and get everything he had, and were never going to let her out; that after she left the sanitarium and up to 1922, Mrs. Smarts was very melancholy; that she told the witness her only pl-easure was to do her own work and not have a servant; that she could not sit down and think. Mrs. Smarts was a very active church woman, occupying the various offices in the woman's society at different times, and her activities in this connection ceased in December prior to her leaving for the loss of her children. Mrs. Asbury testified to a conver-sation which she had with her, in which she talked about the children,and where they might be, and the witness expressed the wish that she might be more sure of "the after life", and Mrs. Smarts replied: "I am I know." The witness testi-fied that she saw Mrs. Smarts in the summer of 1922, probably twice, and that she then seemed to be getting stronger, but

rational, and she took care of her affairs.

Dr. William G. Stearns testified that he had made a specialty of mental and nervous diseases and that he had formerly had charge of a sanitarium at Lake Geneva; that Dr. Swartz had been a friend of his, and that at his request he had visited Mrs. Swartz during the spring following the Iroquois Fire, and that on his recommendation Mrs. Swartz went to the sanitarium and remained about four weeks. He described her condition at the time he examined her and said that it was typical of acute melancholia. The doctor described Mrs. Swartz as he observed her at the sanitarium, saying she kept aloof, was quiet, responded with hesitation, the expression of her face showed great grief and anxiety, and she worried about things the nurses did, and so on; that she improved in every way and he moved her from the sanitarium for mental cases to one for nervous cases, and a matter of days thereafter, she was discharged and returned to her home.

Dr. and Mrs. Swartz took a trip to Alaska in the summer of 1914, and Dr. Stearns testified that he saw her after that and his impression was that she was perfectly normal, and at another time she was distinctly abnormal, in that she was reticent and showed "a little bit of the stolidity that she had when actually ill;" that he did not recall seeing her for a year before Dr. Swartz died; that his opinion was, the last time he saw her, that she was suffering from melancholia, but he would not say it was acute. He described melancholia in some detail and said that men thus afflicted can frequently go on with their business or profession; that persons thus afflicted may have certain delusions, but that in everything that does

anything, and she took care of her relatives.

Mr. Wilkins is unknown available this so not made a specialty of mental and nervous diseases and that he had formerly had charge of a sanitarium at Lake Geneva; that Mr. Swartz had been a friend of his, and that at his request he had visited Mrs. Swartz during the spring following the Lincoln Fire, and that on his recommendation Mrs. Swartz went to the sanitarium and remained about four weeks. He described her condition at the time he examined her and said that it was typical of manic insanity. The doctor concluded Mrs. Swartz as he observed her at the sanitarium, saying she just about, was quiet, responded with hesitation, the expression of her face always looks glad for anything, and she worried about things the nurses did, and so on; that she thought in every way but be patted her from the sanitarium for mental cause in one for nervous cause, and a matter of deep character, who was disinterested in her case.

Mr. and Mrs. Swartz took a trip to Alaska in the summer of 1914, and Mr. Swartz testified that he saw her after that and her improvement was that she was perfectly normal, and as another time she was distinctly abnormal. In that she believed her mother in little out of the ability they are not when actually ill;" that he did not recall seeing her for a year before Mr. Swartz died; that his opinion was the last time he saw her, that she was suffering from melancholia, but he could not say if she was sane. He described melancholia in some detail and said that her time affected her frequently on at all that delusions or hallucinations; that persons the patients may have certain delusions, but that it characterize that person.

not concern these delusions they might be perfectly competent and normal. He also testified that while Mrs. Swartz was in the sanitarium she seemed to have the notion that they did not have enough money to pay their bills and that she was ruining the Doctor financially; that she was suicidal, but that he could not remember what she said or did that made him think so. This witness was asked a lengthy hypothetical question, and stated that, disregarding his own personal knowledge of Mrs. Swartz, and considering only the facts recited in the question he had an opinion as to whether she was sane or insane on July 19 and 24, 1916, and, over objection of the defendants he was permitted to state that his opinion was that she was of unsound mind. In our opinion the question was objectionable, both for what it contained and for what it did not contain. The question included much that in our opinion was unwarranted conclusion and omitted many facts which had a most important bearing on any opinion relating to her sanity at the times referred to.

A Mrs. Brace testified that she had known Mrs. Swartz about ten years and that up to a short time before her husband died she saw her every three or four weeks; that Mrs. Swartz was active in connection with the luncheons served at the church at meetings of the Woman's Society; that whenever sandwiches were prepared, she always saved the crumbs and took them home; that she always kept the church silver at home for safe keeping, although there was a place to keep it under lock and key at the church; that John W. Swartz and his wife frequently came to the church for their luncheon on the days they were held and that Mrs. Swartz always got very excited when anyone came into the kitchen and told her that they were there; that she took in sewing, explaining that she wanted to get the money to educate a girl in Alaska; that the witness invited Mrs. Swartz to a lunch-

not concern their relations they might be perfectly competent and normal. He also testified that Mrs. Martin was in the matrimonial one manner to have the notion that they did not have enough money to pay their bills and that she was ruining the doctor financially; that she was suicidal, but that he could not remember what she said or did that made him think so. This witness was asked a leading hypothetical question, and stated that, disregarding his own personal knowledge of Mrs. Martin, and considering only the facts recited in the question he has an opinion as to whether she was sane or insane on July 12 and 14, 1912, and, after objection of the defendants he was permitted to state that his opinion was that she was of unsound mind. In our opinion the question was objectionable, both for what it contained and for what it did not contain. The question then included much that in our opinion was uncontested concession and omitted many facts which had a most important bearing on any opinion relating to her sanity at the time referred to.

A Mr. Jones testified that she had known Mrs. Martin about ten years and that up to a short time before her husband died she saw her every three or four years. Mrs. Martin was active in promoting the Lookeba school in the county at meetings of the Women's Society; that whenever conventions were planned, she always served the crumbs and look them home; that she always kept the church silver at home for safe keeping, although there was a place to keep it under lock and key at the church; that Mrs. E. Martin and his wife frequently come to the church; that Mrs. Martin knew the Mrs. Ivy have been held and said that there always yet Mrs. Martin when Mrs. Ivy came into the kitchen and told her that they were there; that she took in sewing, considering that she managed yet the money to estimate a fact to display that the witness testified for. Testing be a long

son a few weeks before she went east with her brother, but she declined explaining that she had to go and stay in the cemetery all day; that in her opinion Mrs. Swartz was insane. She also testified that Mrs. Swartz was much more strange after the Doctor's death than before; that she appeared suspicious; that she would, upon being asked a question, look all around and then lean over and whisper her answer, although no one else was present.

One Stevenson testified that he had known the Doctor and his wife for 25 or 30 years, as neighbors; that he did not know her handwriting; that he received two letters in the summer of 1916, signed with the name of Mary F. Swartz; that one of these letters simply said: "Send me $500.00;" that the witness owed Mrs. Swartz no money and made no reply to the communication. The evidence as to the contents of this letter was admitted over the objection of the defendants. In our opinion the objection should have been sustained.

A Mrs. Munger testified that she had known Mrs. Swartz about 26 years; that following the death of her children and up to the death of the Doctor, she used to see her every two weeks at the church. Her testimony was much the same as that given by Mrs. Brace. On cross-examination she testified that during the time she knew Mrs. Swartz she had spells of being as rational as anyone; that she seemed worse after the Doctor's death, when her eyes were wild and shifting; and she would talk in an undertone; that she was a very fine woman, and a very efficient worker in everything she did at the church; that she held every position that could be given to a woman, in the church, and that during all that time she did her work very efficiently and on some occasions presided at meetings; that she presided

[illegible] a few weeks before she went out with her brother, but she declined explaining that she had to be out early in the morning all day. Just in her opinion Mrs. Martin was insane. She also testified that Mrs. Martin was much more strange after the incident [illegible]; that she appeared nervous; that she would, upon being asked a question, look all around and then look over and whisper her answer, although no one else was present.

The Superintendent testified that he had known the deceased and his wife for 22 or 23 years, as neighbors; that he did not know her immediately; that he received the letters in the summer of 1919, signed with the name of Mary F. Martin; that one of them bears simply said: "Send me $[illegible]." that the signature was her. Martin so nearly resembles to imply in the communication. The evidence as to the contents of this letter was admitted over the objection of the defendants. In our opinion the objection should have been sustained.

A Mrs. Hunger testified that she had known Mrs. Martin about 20 years; that following the death of her children and up to the death of Dr. Hector, she came to see her every two weeks at the church. Her testimony was much the same as that given by Mrs. Ziegler. In cross-examination she testified that during the time she knew Mrs. Martin she had spells of being as rational as anyone; that she remained weeks after the doctor's death, when her eyes were wild and shifting; and she would talk in an undertone; that she was a very fine woman, and a very efficient worker in everything she did at the church; that she held every position that could be given to a woman, in the church, and that during all that time she did her work very efficiently and no more eccentric [illegible] at meetings; that she [illegible]

well and took responsibility; that she was very economical, a charitable woman and interested in the poor and so on.

The complainants offered in evidence the deposition of Lester P. Hoag, to whom reference has been made. He testified that in 1916 Mrs. Swartz visited his father's home in Springport, Michigan, and that not long after that his parents had a communication that she was sick, whereupon, he came to Chicago and went to her apartment and stayed there several days; that she was then living alone; that on the occasion of this visit he observed her actions and conduct; that he sent the two telegrams to E. J. Fort, which have already been referred to. He testified further that at the time of this visit Mrs. Swartz appeared about as she always had; that she asked him about some matters involving his father and mother and his father's business which he thought she should have known, as she had only recently visited them; that she wanted to know if his father would loan her money, but mentioned no amount; that she appeared no different in conduct and demeanor than at other times when he had seen her; that he sent the telegrams referred to because he wanted Fort to come to Chicago and look after his own relatives; that he felt if she was sick and needed attention, it was Fort's business to look after her; that he was moved to send the telegrams because she spoke about borrowing money; that in his opinion Mary F. Swartz at that time was of sound mind and he did not think she should be placed in an asylum; that when he sent the telegrams he thought her mental condition was normal but that he sent them because he wanted Fort to come to Chicago; that the only question in his mind was the question she asked about borrowing money. On cross-examination he testified that, during his visit to Chicago, Mrs. Swartz appeared normal and happy; that she was modest and backward; that she was the nicest

well and took responsibility; that she was very economical, a charitable woman and interested in the poor and so on.

The complainants offered in evidence the deposition of Louisa E. Long, in which testimony has been made, he testified that in 1910 she, Louisa visited his father's home in Spartanburg, Michigan, and that not long after that his parents had a conversation that she was sick, whereupon he came to Chicago and went to her apartment and stayed there several days; that she was then living alone; that on the occasion of this visit he observed her actions and conduct; that he sent the telegrams to W. C. Carr, which have already been referred to. He testified further that at the time of this visit Mrs. Carrie appeared about as she always had; that she asked him almost none matters involving his father and mother and his father's business which he thought she should have known, as she had only formerly visited them; that she wanted to know if his father would lend her money, but mentioned no amount; that she appeared no different in conduct and demeanor than at other times when he had seen her; that he sent the telegrams voluntarily by request to write Carr to come to Chicago and look after his own relatives; that he felt if she was sick and needed attention, it was Carr's business to look after her; that he was moved to send the telegrams because she spoke about borrowing money; that in his opinion Mrs. C. Dwelle at that time was of sound mind and he did not think she should be placed in an asylum; that when he sent the telegrams he thought her mental condition was normal but that he sent them because he wanted Carr to come to Chicago; that the only question in his mind was the question she asked about borrowing money. On cross-examination he testified that, during his visits to Chicago, Mrs. Carrie appeared normal and

he ever knew; that she was well educated and he understood she read quite actively.

For the defendants, one Kolar testified that he had known Dr. Swartz for 18 years and Mrs. Swartz for 10 years. He was apparently one of the officials of the Drexel State Bank. He testified that in the fore part of 1916, she opened an account in that bank and she transferred the Doctor's funds into an estate account; that he had occasion to talk to her three or four times a week for two months during that spring; that these conversations had to do with business matters relating principally to the keeping and management of her account; that she did not need any more instructions on these matters than any other woman customer of the bank. He gave it as his opinion, from his observation of, and his conversations with her, that she was normal and sane.

The defendants introduced a number of letters from Edwain J. Fort to John E. Swartz. In one dated September 21, 1916, referring to Mary F. Swartz, he wrote: "Mary seems to be quite well and seems to have gained considerable in weight during the summer". In a letter written a week later, he said: "She seemed so entirely well and capable that it did not strike me at all improper that she should go to Washington if she wanted to."

One Dr. Holmes testified that he had known Mrs. Swartz for 18 years, during all of which time he had seen her every three or six months; that he visited Dr. and Mrs. Swartz socially; that he treated Mrs. Swartz in the spring of 1916; that he saw her several times during the month before she left Chicago; that he prescribed for her at this time; that from his examination

he ever knew; that she was well educated and he understood she read quite seriously.

For the defendants, Mrs Kohler testified that he had known Mr. Smurfs for 18 years and that, during the 18 years, he was approximately one of his officials of the Imperial Club. He resided at that in the fore part of 1918, she opened an account as that bank and she exchanged the matter's known into no remote account; that he had occasion to visit to her shop on that block a week for two months during that period; that there conversations she is on main business matters relating principally to the keeping and management of her account; that she did not read any more instructions on these matters than any other woman customer of the bank. He gave it an his opinion, from his observation of, and his conversations with her, that she was learned and sane.

The Plaintiffs introduced a number of letters from Emma L. Fort to Jean E. Smurfs. In one dated September 22, 1918, referring to Mary E. Smurfs, he wrote: "Mary seems to be quite well and seems to have gained considerable in weight during the summer". In a later written a week later, he said: "She seemed so entirely well and capable that it did not strike me at all improper that she should go to Washington if she wanted to."

Mrs M. Milne testified that he lived next to, Smurfs for 18 years, during all of which time he had been very active at his business; that he visited her and her, Smurfs regularly; that he treated her. Smurfs in the spring of 1918; that he had several times during the month before her death; that he prescribed for her as this time; that from his conversation

made then he found she was constipated, was not eating sufficiently, was not sleeping well and complained of disturbances such as headaches, indigestion, and loss of sleep; that her illness yielded to his treatment; that he talked with her from time to time, and, from his observation, he was of the opinion that she was sane at that time; that she had peculiarities and insomnia and was depressed and melancholy; that such symptoms are frequently a part of insanity, but that it does not follow that one is insane because they have them.

One Frank Guppy had charge of the elevator in the building in which Mr. and Mrs. Swartz lived for some six years, ending in 1916. He testified that he saw Mrs. Swartz and talked to her nearly every day, and some time several times a day, and that in his opinion there was nothing wrong with her and that she was not insane,- that he never noticed anything odd about her.

One Dr. Manford, a practicing physician, testified that he knew Mrs. Swartz for about two years prior to the time of her death; that he visited her home on one occasion and met her at other times on the street and at church, when he conversed with her, and at all these times she seemed to be perfectly normal, and that in his opinion she was sane. The occasion of his visit to her home was a Dickens reading, which was given there, and he testified that his talk with her then was largely confined to the works of Dickens.

One Herzog became acquainted with Mrs. Swartz in 1893 and from that time until her death saw her frequently. Their respective families were neighbors and visited back and forth possibly once or twice a week. He testified that he discussed general topics with her every week and from his talks with her

and his acquaintance with her his opinion was that she was sane.

A Mrs. Bourne testified that she went to work for Dr. Swartz at the office of the Phospho-Albumen Co. in 1908, at which time she met Mrs. Swartz; that she worked there two years; that she also saw her and talked with her at Church; that she met her off and on from 1908 to 1916; that she had a talk with Dr. Swartz about his property in the fall of 1908, in which he said that if anything ever happened to him and his wife he wanted his brother John, who had worked just as hard as he had, to receive everything, for he was entitled to it; that the relations between the Doctor and his wife and Cora A. Swartz were very friendly; that the Doctor and his brother were the most devoted brothers that the witness ever saw and that they were very congenial; that Mary F. Swartz would come to the office of the company and invite John and his wife to come to luncheons they had at the church; and that in her opinion Mrs. Swartz was perfectly sane.

One Charles C. Stilwell, a practicing lawyer in Chicago, testified that he and Mrs. Swartz were students at Valparaiso University at the same time and that he knew her for over thirty years prior to her death; that from 1893 to 1894, up to the time of her death he saw her four or five times a year; that she was a very talented woman; that she had read papers, on three occasions at alumni gatherings, and at other times she made talks; that she was a woman who was sometimes taciturn; that she was silent, quite reserved except with her friends and acquaintances, with whom she was communicative, and that she enjoyed their confidence; that she was not one with whom it was easy to become acquainted; but that she always retained her friends when she made them; that she lost two very beautiful children in the Iroquois

fire,and also a sister, and that she appeared sore sad after that, but that otherwise he did not notice any change in her behavior or conduct; that in his opinion she was sane; that he thought he did not see her after the day of her husband's funeral.

One Wilson testified that he also had known Mrs. Swartz and her husband since their school days in 1893, after which time, he saw her from time to time, up to the date of her death, on an average of two or three times a year. The remainder of his testimony was similar to that of the last witness.

Elmer E. Brethers, a practicing lawyer in Chicago testified that he had known Mrs. Swartz and also her husband since 1879; that he was in the same classes they were in at Valparaiso University; that he had visited them when they lived in Elkhart, Indiana; that he had seen Mrs. Swartz three or four times a year since 1892; that she and her husband were active members of the University Alumni Association; that they were also active members of the various committees, and that he talked with her frequently; that he and his wife visited Mrs. Swartz' home in Chicago four or five times. He testified that Mrs. Swartz resumed her activities in the Alumni Association very soon after she suffered the loss of her children and continued these activities until she left Chicago in 1916; that at all times he ever saw her she appeared perfectly rational and that she was "a sedate, retired, meditative person, with far more than the usual strength of mind."; that the last time she was in his office was in April or May, 1916, on which occasion she remained twenty or thirty minutes; that at this time she "appeared perfectly rational,-

perfectly normal"; that he never saw anything in her conduct that was strange or peculiar at any time since he had known her; that he was present at a preliminary meeting of the alumni association, held shortly before the death of the Doctor, when the Doctor and his wife were both present; that at this meeting, which was a luncheon, he sat at the same table with Doctor and Mrs. Swartz, there being about seven people in all at the table; that Mrs. Swartz entered into the discussions, as to the plans for the meeting which was being provided for, with the same interest as the others at the table. The witness gave it as his opinion that at all the times he had ever seen Mrs. Swartz she was a perfectly sane woman. On cross-examination, this witness testified that he and his wife called at the home of Mrs. Swartz once or twice following the death of Dr. Swartz, remaining possibly an hour discussing matters generally and the affairs of the alumni association; that he never heard any rumor there was anything wrong with her mind; that she appeared to be the same after the death of her daughters as before; although he observed that she felt very sad, but he thought she stood up under the terrible shock better than her husband did, a matter which was commented on by others as well as the witness.

Arista E. Williams, another member of the Chicago Bar, testified to the same general effect as the last witness referred to.

It appears that one Isabell Burke had testified on a hearing in the Probate Court and that she had since died. The transcript of her testimony in the Probate Court was read at the hearing of the case at bar. This witness had been the principal of the Wadsworth public school since 1886. She

testified that she had known Mrs. Swartz for 38 years and that after she came to Chicago to live she saw her several times a month and this continued up to the time she went to New York in 1916; that she visited frequently at the home of Mrs. Swartz; that these visits occurred three or four times a month and Mrs. Swartz came to see the witness at her home also; that she was "a very cool, practical woman, with good common sense"; that she never noticed anything unusual about her mental condition at any time, that would lead her to believe that her mind was unbalanced; that at one time Mrs. Swartz spoke about having a spiritual communication with her children; that aside from this the witness never noticed anything unusual either before or after the death of her children. On cross-examination, this witness testified that she knew of Mrs. Swartz being in a sanitarium and she stated that she was with her before she went to the sanitarium but that she did not notice anything wrong with her mental condition. She further testified that a short time before Mrs. Swartz went to New York, she complained that her stomach was failing her. She testified further that Mrs. Swartz was always a very quiet, reticent woman and not very talkative,- "even as a school girl."

As we have already stated, Cora A. Swartz and John E. Swartz were competent to testify only as to such transactions and conversations as had been brought out by complainants' testimony, and further as to such matters as may have occurred after the death of Mary F. Swartz. We regard the conversation Edwin J. Fort had with John E. Swartz at the office of the latter made in the month of May 1916, to which Fort testified, as one occurring between John E. Swartz and Cora A. Swartz and Fort, as Fort testified that Cora A. Swartz was present at least during some of the conversation, and his testimony as to what

John M. Swartz said at that time covered transactions involving Cora A. Swartz. As to this transaction involving the package of money, which Fort testified John M. Swartz told him about, and which was involved in the interrogatories and answers which complainants had introduced in evidence, Cora A. Swartz testified that Mary F. Swartz asked her to put the package in the safe in the office, as she did not want to keep it in the house because she was alone; that when she brought the package to the office she did not say what was in it; that she did not say she had brought the witness $500.00 to help her out of trouble; that she did not say anything about the witness being in trouble. As to these conversations with Fort in the office of John M. Swartz, Cora A. Swartz testified that she was present and heard them; that she and her husband told Fort that Mrs. Swartz ought to be taken from the house and given a change, because it was lonesome there and it was not well for her to continue living there alone; that Fort remarked that Mary was just as well as she ever was but that he would take her home to get her out of the house; that the witness was present at all conversations at the office of her husband, with Fort; that the former never told Fort that Mrs. Swartz was insane or should be sent to an asylum or anything of that sort, and that she, herself, never said anything of that kind; that Fort did not say then that he thought his sister was insane; that in this conversation in May her husband did not say that he was afraid to leave Mrs. Swartz alone or that he sent a man there to watch her, but that he told Fort that he was afraid that Mary was going to be sick, but that he never mentioned insanity; that the witness never heard of that until Fort started it.
This witness further testified that the only time she ever

talked with Edwin J. Fort and Mrs. Hughes about the property of Mrs. Swartz and the only time she ever heard them discuss the subject was on the day of the funeral of Mrs. Swartz, and at that time she heard Fort ask Mrs. Hughes if she knew what Mrs. Swartz had done with her property and what disposition she had made of it, and the latter stated that she did, - that everything went to Mary F. Swartz during her life time and after her death it was to go back to the Doctor's people, that Mary had told her that several times.

John E. Swartz testified to the conversation he had with Fort in the latter part of May, 1916, in the presence of his wife Cora A. Swartz, at his office; that in this conversation he asked Fort if he had been up to see Mary F. Swartz and he replied that he had and that she was all right,- just as well as anybody; that the witness told him that the reason he wanted him to come to Chicago was because he wanted to see if he could not get her to leave the apartment, because he thought it was bad for her to be there all alone, for there was no one to take care of her when she was sick there; that it would be a good thing if Fort could get her to go east and spend the summer with him; that he had tried to get Mrs. Hughes to come up from Valparaiso but she had not done so. This witness further testified that while Fort was in Chicago he told him that Mary F. Swartz had brought him a package of money which was still in the safe in the office, and that he asked Fort what he thought he ought to do with it, and Fort said to keep it and do what he thought best for Mrs. Swartz; that he told Fort he had asked Mrs. Swartz in regard to it, and she told him to put it in the bank in his own name so that at any time she might need it he could get it for her; that the amount was $500.00.

This witness gave a detailed account of all that was done by him in caring for the body of Mrs. Swartz after her death. It appears that when the body of Mrs. Swartz was found, there was discovered in her pocket-book a receipt of the Wells-Fargo Express Company, for a package she had sent from Washington shortly before to John S. Swartz. In this package she had sent some of her clothes together with a letter which was not dated. In this letter she said that she was happy to learn that Cora A. Swartz was recovering from her illness. She writes that there is one thing that she does not remember mentioning particularly in speaking to John Swartz of business matters, and that was the cemetery lot at Oakwoods. She reminds him that she has left the deed with him and says she wishes it to remain in his hands. She points out that there is room for her at the side of her husband and that a portion of the lot has been reserved for John and his wife Cora, if they wished to be buried there. She says: "I write this so that if at any time you should have need and I am not there you may understand." She adds that all the graves were put in order and all the bills were paid before she left home, and refers to the annual expense of keeping the lot up and says she hoped it might be put in perpetual care, but she had not been able to afford it, adding, "Maybe sometime it can be done." The closing paragraph in this letter is as follows:

> "I wish also to say that whatever I die possessed of is given to you and your wife. This is in accordance with an agreement between my husband, T. B. Swartz, and myself, made some years ago, because my brother E.J. Fort, does not need, and my sister Mrs. J. F. Hughes, we considered had had her share in the assistance which we had rendered her since the death of her husband and the fact that I relinquished to her all claim to the estate of our sister, F. Irene Fort, who died in 1903."

This sister was the one who lost her life in the fire with the children of Mrs. Swartz. There are two postscripts to this letter. The first says that the writer has but one debt, amounting to $100 owing to her brother, Edwin J. Fort, and she expressed the desire that John E. Swartz would assume this. The last postscript is as follows:

> "It is my strict command that our children's pictures, the paintings as well as all the others, be destroyed, so that there shall be novestige left. All jewelry and trinkets in your possession shall be disposed of through Cora, not to go to any of my own people that there may be no ban on them."

It further appears that from the express receipt referred to the authorities in Alexandria, Virginia, caused inquiries to be made in Chicago, which resulted in the location of John E. Swartz who went immediately to Alexandria and had the body of Mrs. Swartz prepared for burial, removed it to Chicago, and made all the funeral and burial arrangements. The expenses connected with these matters, he testified, were about $1,000.00. He further stated that since the death of Mrs. Swartz he had placed the cemetery lot under perpetual care, in compliance with the desire she had expressed, at a cost of $205.00. The witness was asked by the court about the telegrams sent to Fort, concerning his coming to Chicago to take care of Mrs. Swartz and the witness answered that these telegrams were sent to Fort merely to get him to come to Chicago and persuade his sister to leave the house she was living in because the witness thought Mrs. Swartz had been sick and his own wife had also been and was sick, and he (the witness) had no means of taking care of Mary F. Swartz, except through strangers. That by reason of this situation, Mr. Hoag came to Chicago from Michigan and the witness consulted with him and told him he had written Fort a letter asking him to come, saying that

he thought Mary was sick and needed a change of environment, but that he had been unable to get Fort to Chicago, "So Mr. Hoag suggested sending him a telegram, and in that way these telegrams were sent. Mr. Hoag wrote the telegrams and the first one he read to me. I never saw or heard the last one and know nothing about it. After the first telegram was sent we got a telegram from Mr. Fort asking about further particulars, and that is when Lester Hoag said that he would write a telegram that would bring him."

On cross-examination this witness was asked about the letter he had written Fort on May 24, 1916, and he said that when he wrote that letter he should have said that Mrs. Swarts was delirious at times on account of being sick, that he "did not consider for a moment that she was insane. She was sick and feverish on account of her stomach, her indigestion. She was not in bed at the time. She was not irrational. Sometimes she would say something, then hesitate and correct herself"; that during the two days when she was feverish or delirious, "she did not say anything to me that was irrational and did not appear to be out of her mind;" that the witness observed a condition which he called, "delirious." Later on he testifies that she seemed to be absent minded for a day or two; that one would think she was going to say something, and she would change her mind and would not; that he was afraid she might have a nervous breakdown, and that was the only reason why he made his letter as strong as he did; that he wanted to get her away from her apartment, which was very lonesome and she was living there all alone. He further testified that to the best of his recollection the matter of Mrs. Swarts borrowing money was never discussed by Fort and himself; that

he paid the rent of the apartment occupied by Mrs. Swartz from the time of her husband's death until it was given up after she had gone to New York; that at the time of the death of Mary F. Swartz she had about $1125.00 in the bank in the witness' name; that he paid her funeral expenses out of this money, spending all of that amount and more.

There is in the record a printed copy, in pamphlet form, of an intelligent and scholarly paper written by Mary F. Swartz and read by her before the Every Wednesday Club of Chicago, in January, 1907, entitled "The Development and Present Status of Scientific Thought." This was some years after the loss of her children and after she had been in the sanitarium.

In addition to the letters of July 19 and July 24, in which Mary F. Swartz makes the gifts in question, to her brother-in-law and his wife, the record contains thirty-four letters written by her to them or to her sister or brother, and one to her nephew, between January 1, 1916 and the date of her death, one of them being written in January, two in February, three in May, seven in June, eleven in July, six in August, one in September, and three bearing no date but apparently written during this period, one of the latter being just before her death and while she was in Washington. These letters cover a great variety of subjects and in our opinion they demonstrate beyond any question, that when they were written Mrs. Swartz was fully possessed of her faculties and that she had a keen, alert mind and that she comprehended all the subjects she wrote of in the letters, - including her personal affairs, and the various matters of business with which she had to do. They are much more eloquent in support of her soundness of mind than the opinions of witnesses could possibly be.

It is not difficult to discover in the record that Mrs. Swartz, although a woman of only 56 years of age, had a motive or reason for giving away her property in the manner she did. In the first place there is abundant evidence and no contradiction of the fact, that ever since her marriage she had lived in close contact with her husband's relatives and had seen her own brother and sister very infrequently. In the next place, she stated several times in the course of her correspondence, in substance, that in making this disposition of her property, she was following out her husband's wishes and fulfilling an agreement she had made with him. Mrs. Bourne testifies that Mr. Swartz told her in 1908 that if anything happened to him and his wife, he wanted his brother to have his property. Complainants consider this testimony as ridiculous and entirely unworthy of belief. And yet, about two years later, the evidence shows that Mr. Swartz executed his will and made precisely that disposition of his property. That Mrs. Swartz appreciated what she was doing, is shown by the condition she attaches to her gifts in her letter of July 24, 1916, by which John Swartz and his wife were to meet her needs and provide for her burial as she directed. Complainants make much of the contention that Mrs. Swartz committed suicide. She may have done so. But while that fact is one which may be considered on the question of her sanity at the time of her death, it by no means follows that it is to be presumed that she was then insane and much less that she was not of sound mind on July 19 and July 24. Grum v. Thornley, 47 Ill. 192; Grand Lodge v. Wieting, 168 Ill. 408; Dickerson v. Northwestern Mutual Life Ins. Co., 200 Ill. 270; Royal Circle v. Achterrath, 204 Ill. 349. In view of the circumstances immediately surrounding her death, the fact that she sent some of her clothing back to Chicago

before she left Huntington and some more after she reached Washington, and in view of some of the things she said in her letters, and particularly the fact that she wrote the letter which she included in the latter package of clothing, it might reasonably be contended that she contemplated suicide. If anything, that would seem to lend an additional motive or reason for her making the disposition of the property as she did by her letters of July 19 and 24, and thus insuring the consummation of her husband's wishes in regard to the property. It is not without significance that she wrote these letters when she was a thousand miles away from the defendants and within a mile of her brother and living with people who were strangers to all of them.

Before the court would be warranted in setting aside these gifts on the grounds urged, the evidence must be held to clearly show that on July 19 and July 24, when she made these gifts, she was incapable of understanding, in a reasonable manner, the nature and effect of her acts in writing these letters. Wickes v. Walden, 228 Ill. 56; Carnahan v. Hamilton, 260 Ill. 508; Blackhurst v. James, 293 Ill. 11; Baddeley v. Watkins, 293 Ill. 394; Heiligenstein v. Schlotterbeck, 300 Ill. 206. On the decisions made by our Supreme Court in those cases, we hold that in the case at bar, the facts here making out a much weaker showing of mental incapacity than in the cases cited, the decree appealed from is not supported by the evidence. In this connection we have carefully examined decisions cited by complainants. They particularly call our attention to the case of Weller v. Copeland, 285 Ill. 150, contending that the facts of that case were almost identical with the facts of the case at bar. In our opinion there is no comparison between them.

In the case at bar the only direct evidence in the

record, of the mental condition of Mrs. Swartz on July 19 and July 24, is the letters themselves of those dates. In our opinion there is nothing in them even suggesting mental incompetency. The only person who saw her at these times, was Mrs. Sammis, in whose home she was then living, and by whom she was employed from June 23 to September 20. Although she had had an opportunity to observe Mrs. Swartz daily during that period, and was thus in a position to express an opinion as to her mental condition, she was not interrogated on that question. We do not attach importance to the testimony of Dr. Stearns. He did not see Mrs. Swartz after 1914. The hypothetical question put to him, included a number of conclusions without any reference to the facts alleged to warrant them and omitted many material facts, chiefly the letters of Mrs. Swartz, many of which were written very close to the dates in question, July 19 and July 24. Other than the interested witnesses, the only ones to venture an opinion as to the sanity of Mrs. Swartz, and who had an opportunity of observing her at or shortly before her departure for Brooklyn, were Lester F. Hoag, Andrew J. Kolar, Dr. Holmes, Frank Guppy, Elmer D. Brothers, and Isabell J. Burke, and they all give it as their opinion that she was then sane.

Much is made by the complainants of the alleged efforts of Mrs. Swartz to borrow money. Clearly she did not need it but she apparently wanted it, but for what reason is not disclosed. There is, in our opinion, no evidence from which it might reasonably be concluded that such a desire on her part was either unwise or foolish, let alone such as might indicate insanity or the presence of delusions.

The delusions which it is claimed Mrs. Swartz had, were to the effect that Tore A. Swartz was in some kind of trouble

calling for her financial assistance. The testimony on that question comes solely from the interested witnesses, pro and con. The evidence in the affirmative is largely, if not entirely, based on alleged statements made by John H. Swartz or his wife, as testified to by Mr. Fort and Mrs. Hughes, all of which are denied by John H. Swartz and his wife.

After all the oral testimony is considered, we come back to the many letters written by Mrs. Swartz during the spring and summer of 1916, eighteen of which were written within thirty days of the dates on which she made the gifts in question. If a decision has to be reached as to the mental competency of Mrs. Swartz from these letters, it would necessarily be one sustaining the gifts. In our opinion, unbiased persons could not reasonably differ on that question. Furthermore, the strength of this proof cannot be said to be overcome or materially lessened by such other evidence as the record contains, either that involving the opinions of witnesses or that referring to the several things either said or done by Mrs. Swartz at different times, which may be considered odd or peculiar, even assuming the latter to indicate that at such times, none of which were near the times of the gifts in question, she was not in an entirely normal mental condition. Some of these things which are urged as indicating mental incompetency, in our opinion may much more reasonably be explained in other ways. That the tragic deaths of her only children should materially affect her in the manner referred to by some of the witnesses, is not to be wondered at, nor that she should experience nervous prostration or melancholia requiring treatment in a sanitarium. This was in 1904, twelve years before the making of these gifts. There is abundant evidence that Mrs. Swartz fully recovered her health in every way after that time. After

the sudden death of her husband as the result of a stroke of apoplexy, she was entirely alone so far as her immediate family was concerned. That she should thereafter feel that she had nothing to live for but the hope, in which she indulged with absolute confidence, that she would rejoin her loved ones in the life beyond the grave, and that she should find the "only panacea for such sorrows as mine have been", in employment at some work, is certainly not evidence of insanity. Nor is the fact that she wanted to borrow money, even assuming, in asking her sister for a loan, she told her she owed money to her sister-in-law, when the latter testifies to the contrary.

On one or two occasions, in her correspondence with John H. Swartz, following the dates of these gifts, Mrs. Swartz refers to portions of the subject-matter of the gifts, in such a way, as, complainants contend, indicated she considered it as her own, - for example, her request that the money in her savings account be sent on to her brother so that it might be placed in a bank in New York where it would be available if she needed it. In our opinion there are other reasonable explanations of these incidents. When she made these gifts to John H. and Cora A. Swartz, they assured her that at any time she might need "any of it", they would cheerfully turn it over to her,- this by way of their assuring her of their acceptance of the gifts and the condition attaching to them. She was but exercising what she deemed was her privilege under the terms of the gift as accepted by the donees, at the times she made such requests as the one referred to.

So far as the cash in the savings account, and certain money ($526.25) realized by John H. Swartz from the sale of the furniture of Mary F. Swartz, (which sale was made pursuant to

the directions of the latter) and another amount ($100) collected by him as interest on certain of the securities in question, are concerned, there can be no real controversy between the parties. It is not denied that John E. Swartz expended all these funds and more, in having her body returned to Chicago and buried in the spot designated by her, and in putting the family burial lot under perpetual care, for which she had expressed a wish. The only property really in controversy here is the bonds covered by the gifts.

The decree of the Circuit Court is reversed and the cause is remanded to that court with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR AND O'CONNOR, JJ, CONCUR.

295 - 27253

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel FLORENCE GEHRKE,

Appellee,

v.

TONY GRUBA,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a bastardy proceeding. There was a hearing before a jury and at the close of all the evidence, the court instructed the jury to return a verdict finding the relatrix, Florence Gehrke, was an unmarried woman and that a male child had been born to her on January 8, 1921, and that the defendant, Gruba, was the father of the child. This verdict was returned according to the instructions of the court, and judgment was duly entered against the defendant, by the terms of which he was required to pay $1,100.00 in installments according to the terms of the statute. To reverse this judgment the defendant has perfected this appeal. It is contended in support of the appeal that it was error for the trial court to instruct the jury to return a verdict against the defendant and that on the whole evidence the issues should have been submitted to the jury for their determination.

The relatrix testified that she had become acquainted with the defendant during the winter and spring of 1920; that he first had intercourse with her on April 4, 1920, and about twice a week thereafter until July 7 of that year, which was the last time. She further testified that she had never had

intercourse with any other man; that her last menstruation period was in March; that she visited a Dr. Sondel in October, going to his office with the defendant and his brother-in-law; and that on that occasion Dr. Sondel asked her certain questions and made a note of her answers. On re-direct examination, she testified that she visited this doctor on the request of the defendant who told her he was going to take her to a doctor to "get rid of it". The mother of the relatrix testified to seeing the defendant waiting out in front of their home frequently during the period from April to July, and that also, after she learned of the condition of her daughter, she saw the defendant sometime in September and told him that her daughter was pregnant and asked him if he did not think he ought to marry her and that he said that he did not know,- he did not have to marry her.

For the defendant, Dr. Sondel testified that he examined the relatrix on the first or second day of October; that at that time she told him her last menstruation period was on May 5, and that she had had intercourse with the defendant the latter part of May or the first part of June. On cross-examination, he testified that the defendant and his brother-in-law came to the office with the relatrix; that the brother-in-law came into the private office first and told him he had a patient he would like to have the witness examine; that he thereafter examined the relatrix, out of the presence of the defendant and his brother-in-law, after which they were admitted to the doctor's private office. The court asked the doctor whether a normal child could be born 249 days (the period between May 5, 1920 and January 8, 1921) after the last menstruation, and he said that it could but that it was rare. He was

then asked whether, in his opinion, assuming that the last menstruation period of the relatrix was on May 5, 1920, and that the defendant had had intercourse with her on May 29, the defendant could be the father of the child born on January 8, succeeding that time, and he said it was possible.

The defendant lived with his sister and brother-in-law. It seems from the evidence that a party was held at their home about the first of May and that the relatrix was present at that party with the defendant. The defendant's brother-in-law testified that that was the first time he ever saw the relatrix and that when the defendant introduced the relatrix to the others that evening, he was obliged to ask her what her name was. Evidence to the same effect was given by the defendant's sister and another woman who was present at the party. The defendant's brother-in-law testified further that he and the relatrix and the defendant went to the doctor's office and the witness told the doctor he had a case for him and that he wanted the doctor to examine the relatrix,- "but what the trouble was, I couldn't say"; that the doctor examined her and took a statement from her and told them she was pregnant; that the relatrix told the doctor that the intercourse had taken place the latter part of May or the first part of June.

The defendant testified that he had never been out with the relatrix prior to the date of the party above referred to. He was asked whether he had ever had intercourse with the relatrix and he answered that he did have on May 29, 1920, but that that was the only time. He further testified that he accompanied the relatrix to the doctor's office but that she did not say at any time that she was pregnant; that the first time

he learned she was pregnant was at the doctor's office. He was asked how he came to go to the doctor's office, and he answered: "She called me up and wanted to make a date, * * * and I told my brother-in-law if she wants me to go any place with her I didn't want to go out with her"; that he met the relatrix at her request and "she said she wasn't feeling good and she wanted to go to a doctor;" and he then described what happened at the doctor's office, substantially as the brother-in-law had.

On this evidence, we are of the opinion that the trial court did not err in directing a verdict against the defendant. The relatrix gave birth to a normal child and she testified that she had had intercourse with the defendant and with no other man. The defendant did not deny that he had had intercourse with her, but he admitted it, his contention being, however, that there had been but one act and that on May 29, previous to the date of the birth of her child. The testimony in behalf of the defendant was to the further effect that the relatrix had stated that her last menstruation period occurred May 5. The doctor who was a witness for the defendant was then asked whether or not, on the facts taken from the evidence submitted in behalf of the defendant, and assuming that the last menstruation occurred on May 5, and that there was a single act of intercourse on May 29, it would be possible that a normal child might be born the following January 8, and he said it was possible. In our opinion, the instructed verdict for the plaintiff was justified on the defendant's own theory of the case. Added to this, it may be noted that the testimony of the relatrix, to the effect that she had never had intercourse with any other man than the defendant, stands in the record without contradiction. No testimony was presented, showing or tending to show, that she had had intercourse with

others.

The motion for a peremptory instruction should have been denied, if there had been any evidence in the record which, standing alone, would tend to prove the defendant not guilty, even though the court might be of the opinion that a verdict for the defendant, if given, would have to be set aside as against the preponderance of the evidence. Libby, McNeill & Libby v. Cook, 222 Ill. 206. In our opinion there is, however, no such evidence. The defendant admits intercourse with the relatrix, at a time when his own witness, the doctor, testifies would make it possible for him to be the father of the child of the relatrix. The story told by the defendant and his brother-in-law about the visit to the doctor with the relatrix, because she was not feeling well, and with no thought on the part of either of them that she was pregnant, is so preposterous as to be, in substance, an admission of his guilt.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

(3 + 12)

313 - 27271.

JOSEPH J. SCHNEIDER, Administrator of the Estate of Walter Giltzow, Deceased,

Appellee,

v.

JOHN E. JAMES, ET AL. ON APPEAL OF JOHN E. JAMES,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

223 I.A. 623

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action on the case originally brought by the deceased, Walter Giltzow, against John E. James and Wendell James, to recover compensation for injuries alleged to have been caused by the defendants in negligently driving their automobile past a street car, when it had stopped to discharge passengers, and in knocking the plaintiff down and injuring him, as he alighted from the front platform of the car. The incident occurred on July 22, 1917. The original plaintiff filed his declaration on May 26, 1918. It charged that the defendants so negligently operated and managed the automobile, that it struck the plaintiff and caused the injuries complained of. On July 21, 1919, the plaintiff, Giltzow, died, from other causes, and subsequently the administrator of his estate was substituted as party plaintiff, and in June, 1920, an amended declaration was filed, which, except as to the allegations relating to the party plaintiff, was identical with the declaration which had originally been filed. In March 1921, the present plaintiff filed four additional counts, all of which were identical with the amended declaration, except that they declared against John E. James only and charged that

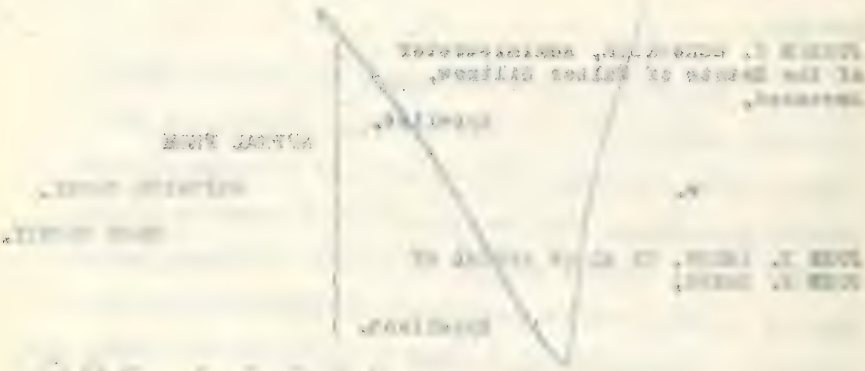

FIGURE 1. CONSERVATIVE, NATIONALIST, LIBERAL AND NATIONAL STATE PARTIES IN THE SENATE OF EASTERN CANADA, 1900-1911.

Source: Canada, Sessional Papers, 1900-1911.

FIGURE 2. LIBERAL, CONSERVATIVE AND NATIONALIST PARTIES IN THE SENATE OF WESTERN CANADA, 1900-1911.

Source: Canada, Sessional Papers, 1900-1911.

3. Political Parties Changed Measures the Nation's of the Senate.

That was to prove to be, when originally proposed by the Conservative, Senator William John G. Ross and Senator Lewis, an clever manoeuvre for Liberals alarmed at more than usual by the extravagance of Conservative nationalist pass a strong one, when it had chosen to Conservative manoeuvres, and in knocking the Liberally down and inflicted him, so to eliminate from the front benches of the war. The Liberals succeeded on July 4, 1911. The original NATIONALIST PARTY in Conservatives on the 4, 1911. It stopped that the Nationalists or politically conscious and changed the nationalists, that it stopped the Liberal and caused the Liberal was completed at. On July 4, 1911, the Liberals, Liberal, Free Trade Conservatives, and nationalistically the administration of the Senate was substituted on party Liberals, and in June, 1911, as measured Conservatives was first, which, enough to be the Liberals Senate by the party Liberal, was Liberal and also Nationalists which the Liberally been first. In June 1911, the Liberal Liberal Free Nationalist Senate, all of which were Liberal with the Senate Conservatives, enough

the acts of negligence complained of were committed wilfully and wantonly. Before the case went to the jury, all the counts except these additional counts were dismissed. The trial resulted in a verdict, finding the issues for the plaintiff and assessing his damages in the sum of $3,000.00. Judgment for that amount was duly entered, to reverse which the defendant has perfected this appeal.

In the trial court the question of whether the additional counts stated a new cause of action, and were therefore barred by the Statute of Limitations, was duly raised, and while it was not raised properly nor disposed of in the trial court as it should have been, it has been argued by both sides in this court and treated as though it was properly before us and we will so regard it. It is urged that the additional counts, charging the defendant with wilfull and wanton negligence, state a different cause of action than was stated in the original declaration, which merely charged that the defendant operated his automobile in such a negligent manner as to strike the plaintiff and cause the injuries in question, and that, therefore, the period of the Statute of Limitations having run previous to the filing of the additional counts, they were barred.

In our opinion, the additional counts did not state a new cause of action. In them, the plaintiff bases his right to recover on the same acts of the defendant, the contention being, in the additional counts as the original declaration, that these acts were negligent. The only difference in the allegations in the additional counts and the original declaration, as to the negligence complained of, were with respect to the degree of the negligence. If the same evidence which

the part of implicitness manifestation of view constituted wrongfully and redefinitely. Before the case went to the jury, all the counsels except those original counsels were dismissed. The trial resulted in a verdict, finding the Lessor for the plaintiff and assessing his damages in the sum of $3,000.00. Judgment for that amount was duly entered, an appeal with the defendant has intervened this appeal.

In the trial court the question of whether the additional counsels should a new cause of action, and were therefore barred by the statute of limitations, was duly raised, and while it was not raised properly or discussed as in the trial court as it should have been, it has been argued by both sides in this court and therefore we thought it was properly before us and we will so treat it. It is argued that the additional counsels, changing the relationship which existed and having duplicity, stated a different cause of action from our court in the original complaint. Since a different cause of action was not stated in the original complaint, we think strongly argued that the statutory provision can hardly be more a mandatory matter as it affects jurisdiction and cause the lapsing of the statute of limitations during the pendency in the trial of the original and wrong, the error bound.

In our judgment, the additional counsel did not state a new cause of action. In fact, the plaintiff based his right to recover on the same duty of the defendant, the monopoly rule. In the additional counsel by the original counsellors, the same duty was implied. The only difference is the information in the additional counsel was more specific and, in the opinion of the majority of the court, was only amount.

the plaintiff would have been required to submit, in order to entitle him to a verdict under the original declaration, had been submitted under the additional counts, he would still be entitled to a judgment. Guisnion v. De Camp Coal Co., 242 Ill. 278. Of course, on such proof under the additional counts the plaintiff could not ask for exemplary damages and although, to make out a case entitling him to a verdict under the original declaration, the plaintiff would be obliged to show that he was in the exercise of due care, that would not be necessary in making proof under the additional counts.

In contending that the cause of action stated under the additional counts is different from the one stated in the original declaration, defendant argues that whereas a capias ad satisfaciendum might issue upon a judgment recovered under the additional counts, no such process could issue upon any judgment entered upon the original declaration. That is not a correct statement of the law. Under the provisions of Section 8, chapter 77, Illinois Statutes, such a writ might issue upon any tort judgment.

In Blanchard v. L.S. & M. S. Ry. Co., 126 Ill. 416, an additional count was filed after the period of the Statute of Limitations had run, which was substantially the same as one of the counts in the original declaration, except that it charged the defendant with a wanton and reckless disregard of its duty. To this additional count the defendant filed a plea of the Statute of Limitations. The plaintiff demurred to that plea and the court overruled the demurrer, and the Supreme Court held that that action of the trial court was error, saying: "The additional count did not introduce a new cause of action, but was a mere restatement, by way of amendment, to the

the plaintiff would have been required to submit, in order to establish his or a vendee under the original decision, has been submitted under the additional results, he would still be entitled to a judgment. Dalmacio v. The Court Court Co., 249 Ill. 279. At bottom, on such proof under the additional facts the plaintiff would not be entitling damages and although, in order for a case entitling him to a verdict under the original declaration, the plaintiff would be obliged to show that he was in the execution of his duty, that would not be necessary in making proof under the additional counts.

In proceeding that the head of making plaintiff under the additional counts is different from the one stated in the original declaration, defendant argues that whereas a motion to misjoinder might have been that a defendant interposed under the additional counts, on such motion a right judgment entered upon the original declaration. That is not a correct statement of the law. Under the provisions of Section 2, chapter 77, Illinois Statutes, such a motion might have been the proper judgment.

In Blackmarr v. I.C. R. R. Co., 249 Ill. 489, an additional count was filed after the period of the statute of limitations had run, which was substantially the same as one of the counts in the original declaration, except that it charged the defendant with a wanton and reckless disregard of its duty. To this additional count the defendant filed a plea of the statute of limitations. The plaintiff demurred to that plea and the court overruled the demurrer, and the defendant then sale that motion of the case, stating the ruling: "The additional count did not introduce a new cause of

cause of action set up in the original counts of the declaration." The court went on to say that such error, however, worked no harm to the plaintiff, inasmuch as all the evidence which might have been introduced under the additional count was admitted under the original counts. The ruling of the Supreme Court on this question was cited by this court, and followed in Blaney v. Cotton, 189 Ill. App. 205.

In support of the contention that the judgment should be reversed, the defendant urges further that counsel for the plaintiff was guilty of making prejudicial remarks in the hearing of the jury in the course of his arguments. The first remark complained of was one to the effect that plaintiff had a right to live. Such a remark should not have been made and the one who made it admits it in his brief filed in this court. Its possible prejudice lay in the fact that the plaintiff was dead, although he did not die as a result of the accident. From all the evidence, however, and the instructions of the court, it would seem impossible for the jury to confuse the death of the plaintiff with the injuries which were received some time before, and which were the basis of this action, even though the remark complained of, was made. Furthermore, the remark was immediately withdrawn and counsel for the defendant seems to have been satisfied with that for he did not secure a ruling of the court on his objection.

The other remark made by counsel for the plaintiff in argument, to which objection was made, was apparently in reply to a statement which had been made by counsel for the defendant in his argument. The latter had argued that the fact that the defendant was charged with wilfull and wanton conduct, in bring-

means of action out by in the original counsel of the defendants.* The court said so to say that even error, however, worked no harm to the plaintiff, inasmuch as all the evidence which might have been introduced under the additional count was admitted under the original counts. The ruling of the Supreme Court on this question was stated by Lord Ashburton, and followed in Bunce v. Gardner, 182 Ill. 499-507.

In regard to the contention that the judgment should be reversed, the Supreme Court said that inasmuch as the plaintiff was guilty of certain negligence because in the keeping of the jury in the course of his supervision. The Court remark complained of was one in the effect that plaintiff had a right to live. Such a remark should not have been made and the one who made it admits it in his Brief Filed in this court. The possible prejudice lay in the fact that the plaintiff was dead, although he did not die as a result of the accident. From all the evidence, however, and the instructions of the court, it could come impossible for the jury to overlook the death of the plaintiff and it the injuries which were received from the defendants, and which were the basis of this action, just through the remark complained of, was made. Furthermore, the record was immediately withdrawn and counsel for the defendant asserts to have been satisfied with that for he did not secure a ruling of the court on the objection.

The third ground made by appellant for the reversal is argument, to which objection was made, was apparently in reply to a statement which had been made by counsel for the defendant in his argument. The latter had stated that the test that the defendant was charged with skill and ordinary diligence in driving

ing about the plaintiff's injury, presented a situation that permitted the jury to find the issues for the plaintiff, upon the ground of negligence, although they might believe from the evidence and find that the defendant had not been guilty of wilfull and wanton conduct. Apparently, in this argument, counsel for the defendant was referring to a special interrogatory that was to be submitted to the jury, in which they were to be asked to find specifically whether the defendant was guilty of wilfull and wanton conduct, as charged in the declaration, and the defendant was presumably arguing that even if they might believe that the defendant was negligent, and return a verdict to that effect, they might also find the defendant was not guilty of wilfull and wanton conduct, in connection with the injuries the plaintiff has received.

In referring to that argument, counsel for the plaintiff told the jury that it was "a trick" and that if they found that the defendant was not guilty of wilfullness, then any verdict they might return in favor of the plaintiff, generally, could not stand. On objection being made, there was some argument between the court and counsel and it was contended by counsel for the plaintiff that in order that the plaintiff might recover, it was necessary to prove wilfullness. Again counsel for the defendant objected and contended that this was not a correct statement. In our opinion, counsel for defendant was right in his contention, and counsel for plaintiff was wrong, but we find no reversible error in this incident. The court entered no ruling in the matter nor was such a ruling urged. At the close of the remarks above referred to, the court merely directed counsel to proceed with his argument.

The defendant further urges that error was committed by the trial court in connection with the giving of instruc-

[illegible] plaintiff's injury, proceeding a statutory tort permitted the jury to find the issues for the plaintiff, upon the ground of negligence, although they might believe from the evidence and find that the defendant had not been guilty of willful and wanton conduct. Specifically, at this stage, counsel for the defendant was informing the wrongful injury that was to be evaluated by the jury, in which they were to be asked to find specifically whether the defendant was guilty of willful and wanton conduct, as charged in the complaint, and the defendant was presumably stipulating that even if they might believe that the defendant was negligent, and thereby a verdict in that effect, they might also find the defendant was not guilty of willful and wanton conduct, in accordance with the instructions the plaintiff had received.

In returning to that argument, counsel for the plaintiff told the jury that this was "a trial" and that if they found that the defendant was not guilty of willfulness, then any verdict they might return in favor of the plaintiff, generally, would not stand. In substance being made, there was apparently before the court an argument that if the defendant by counsel for the plaintiff was in error that the original might recover, it was necessary to prove willfulness. Again counsel for the defendant objected and contended that this was not a proper statement. In her ruling, counsel for defendant was right in his contention, and counsel for plaintiff was wrong, but we find no reversible error in this incident. The court allowed no ruling in the matter nor was such a ruling asked. At the close of the remarks also referred to, the court properly directed the jurors as to the evidence,

The instructions stated that after the jury had [illegible]

tions. It appears from the record that an instruction was originally submitted by the plaintiff, but withdrawn previous to the reading of the instructions to the jury by the court, but, for some reason, the withdrawn instruction was not taken out and when the court proceeded to read the instructions to the jury that instruction was included in the reading with the others. Thereupon the court's attention was called to the fact that the instruction which had been withdrawn had inadvertently been read to the jury and the court immediately told the jury that that instruction was withdrawn. The error claimed to have been committed was that in withdrawing the instruction from the consideration of the jury, the court indicated which instruction was being referred to, by reading only a part of it. In our opinion this contention is not tenable. It would seem that the jury must have had clearly in mind, from what the court said, just which instruction was being withdrawn.

Further error is alleged in connection with the giving of an instruction in which the jury were told that it was admitted that the defendant owned the automobile which struck the plaintiff's intestate, and that when the automobile struck him, "the defendant was either operating said automobile, personally or was operating it by his agent, as alleged in the declaration." It is the contention that inasmuch as no one of the additional counts charged the defendant was operating the automobile by an agent, the words at the end of the instruction, "as alleged in the declaration", could not be supposed by the jury to refer to any charge in the declaration that the defendant was operating the automobile through his agent, but that the jury must necessarily have taken that clause in the instruction to refer to the manner in which the

defendant was charged with having operated the automobile, and that by using this language in the instruction the court, in effect, told the jury that it was admitted that the defendant owned the automobile and that when it struck the deceased, the defendant was operating it in the manner charged in the declaration, namely, with wanton negligence. In our opinion, this is a rather strained construction of the language found in the instruction. The declaration did allege that the defendant was operating the automobile which struck the deceased at the time the latter was knocked down and injured, and it would seem that the last clause in the instruction, namely, "as alleged in the declaration" refers clearly to the allegations contained in the declaration, as to who was operating the automobile, and we think the jury could not have failed to so understand it.

The defendant finally alleges that the damages assessed by the jury, and the amount of the judgment based thereon, are excessive and out of proportion to the injuries sustained by the plaintiff. This court would not be justified in disturbing the verdict and judgment on this ground unless it could be said that the damages were so excessive as to indicate prejudice on the part of the jury. In our opinion that cannot reasonably be said in this case. The deceased was struck by the defendant's automobile as he was stepping into the street, or just after he had stepped into the street, from the front platform of a street car which had stopped at a street intersection to permit him to alight. The automobile of the defendant was going in the same direction in which the car was facing and according to most of the testimony it was going past the street car at the rate of approximately 20

were

miles an hour. The deceased was knocked a number of feet and was rendered helpless and practically unconscious. The deceased was 22 years of age at the time he received the injuries in question. Since boyhood he had been afflicted with what the doctor described as multiple abscesses, which was a blood condition. These abscesses formed on different parts of his body and it was necessary to open and drain them. The doctor who had treated the deceased, off and on for practically his whole life, was called to see him after the injury and found that as a result of the accident the wounds formed by the abscesses had been aggravated, - that those which were practically healed up had been torn open. The doctor also said that the deceased complained of extreme pain and numbness in the spine; that he was unable to use his legs; that there were bruises over his hip and down the thighs; thathe visited the deceased over twenty times; that at those times he was in bed and in pain. He further testified that it must have been about two years before the accident that he last treated the deceased at his home when he was in bed; that his condition was different after the injury; "he was lame and seemed to be numb in the lower extremities."

At the time of the accident in question the deceased was in the employ of the United States Ball Bearing Company, where he had been working for some two years. His mother testified that he always worked steadily and did not have to lay off on account of sickness before he was hurt; that this had been the case for the past nine or ten years; that previous to that he sometimes stayed home a few days. She also testified that the deceased appeared to be suffering great pain

after he received the injuries in question; that he remained in bed about three months after the accident and for about two months he was up and down, returning to work the latter part of December, and that he worked only a short time and then had to stay home again. For the defendant, a physician testified to making an examination of the deceased, at the hospital on the day of the accident and stated that he found several open sores about his abdomen and hip and a slight bruise back of the hip, and that was all; and that the sores were of long standing. We are unable to say from the evidence in the record that the jury was not warranted in fixing the damages at the sum of $3,000.00, or that their action in that regard was the result of any prejudice on their part. There is evidence in the record tending to show that the deceased was seriously and severely injured. There is also some evidence to the contrary. But in our opinion a finding to the effect that the injuries in question were severe and painful cannot be said to be against the manifest weight of the evidence. The plaintiff may not have been in perfect health, but he had at least been well enough to work steadily, earning about $20.00 or $25.00 a week.

We find no error in the record and therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

338 - 27296

BUTLER CANDY COMPANY,
a corporation,

Appellant,

v.

MILTON J. SABATH, doing business as SABATH CANDY COMPANY,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action in the small claims branch of the Municipal Court of Chicago, for an amount claimed to be due the plaintiff from the defendant for a quantity of candy, sold and delivered to the defendant. In its statement of claim the plaintiff alleged that the candy had been sold and delivered to the defendant by the plaintiff, at the defendant's special instance and request. The defense interposed, was payment. The issues were submitted to the court without a jury and the finding and judgment were for the defendant, to reverse which the plaintiff has perfected this appeal.

By interposing the defense of payment the defendant admitted that the candy had been purchased by him from the plaintiff, and had been delivered to him by the plaintiff. It appears that the order for the candy in question was solicited by a firm of merchandise brokers, doing business in Chicago. The plaintiff company is located in Waukegan, Illinois. After the brokers had been given the order by the defendant's representative, the order was confirmed by a memorandum in writing, sent to the defendant by the

brokers. At the head of this document, confirming the order appears the name of the brokerage firm, following which appear the words, "Sales Ticket", after which there appears the following:

> "Acting as Brokers for Butler Candy Company, Waukegan, Illinois, we have this day sold to Sabath Candy Company, Leiter Bldg., Chicago. Terms 2% - 10 days."

Below this appears a statement of the items making up the order. The payment of which the defendant sought to avail himself, was made on November 26, 1920, to the brokerage company or its representative. In the meantime the candy had been shipped by the plaintiff from its factory at Waukegan to the defendant and had been received by the latter on October 22.

In our opinion the trial court erred in finding the issues for the defendant and entering judgment accordingly. It is apparent from the testimony that the brokerage firm had been authorized by the plaintiff to solicit and receive orders for its goods but that fact does not establish authority in the brokerage firm to receive payment for the goods, where that firm never had possession of the goods and delivery was made to the defendant direct from the plaintiff. Unless the plaintiff had given the brokerage firm authority to receive payment or had held the brokerage firm out as having authority to collect, a payment to the brokerage firm would not be good. Clark v. Smith, 88 Ill. 298. In order to establish its defense of payment, it was incumbent upon the defendant to show that the brokerage firm was authorized to collect, or had been so held out by the plaintiff. This he did not do. No

particular course of dealing has been established between the parties. It was shown that this was the first transaction which had taken place between them.

In this state of the record the finding and judgment should have been for the plaintiff. During the course of the hearing, in reply to a statement made by counsel for the plaintiff, the trial court said: "I am inclined to think the law is with you, but it is mighty poor law." It is, of course, the duty of a trial judge to enter its judgment in accordance with the law and not in accordance with what he thinks ought to be the law.

The judgment of the Municipal Court is reversed and judgment entered in this court in favor of the plaintiff and against the defendant, for the amount of the plaintiff's claim, - $41.40.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR AND O'CONNOR, JJ. CONCUR.

350 - 37308.

GEORGE B. MC CULLOUGH, Appellee, vs. CLARENCE E. FOX, et al. Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of the first class in the Municipal Court of Chicago. The plaintiff, McCullough, filed a statement of claim that he had been employed by the defendants, as co-partners, to render certain services at an agreed salary of $150.00 a month and that he had rendered such services pursuant to that agreement, over a period from May 1, 1918, to January 1, 1919, and that the defendants had failed to pay him the agreed compensation. In their affidavit of merits the defendants denied joint liability; denied that they were indebted to the plaintiff for services or that the plaintiff had performed any services for them or that they had requested the plaintiff to perform any such services for which they had agreed or promised to pay him any money, but they alleged that they had taken over a building from the plaintiff for the amount of rent for which the plaintiff was liable under his lease, which he stated to be $150.00 a month, and further, that it had been agreed between the plaintiff and the defendants that the plaintiff would, without being paid anything further than the rent above referred to, render such aid or services to the defendants in

their business as he was able to while not otherwise employed. The issues were submitted to a jury and resulted in a verdict for the plaintiff and assessment of his damages for the full amount claimed, - $1300.00, for which the court entered judgment against the defendants, to reverse which they have perfected this appeal.

It appears from the record that the plaintiff and one, Gazzolo, were doing business as McCullough & Company, manufacturing castile soap, with a factory located at 3119 Rice Street, in the City of Chicago. Apparently the World War was interfering with their supply of Olive Oil, and in the spring of 1918 they were not doing much business.

The defendant partnership was in the business of salvaging damaged steaks of grain and other materials for companies that had insured the goods that had been damaged. In the spring of 1918, the Hershey Chocolate Works, in the State of Pennsylvania, was burned, and about a million pounds of chocolate was turned over to the defendants for rendering so that its constituent parts could be taken out and salvaged. The defendants attempted to handle this work in Buffalo or Cincinnati or the Stock Yards in Chicago, but seem to have been unsuccessful. They then came into contact with the plaintiff and they made an agreement with him whereby they were to occupy his factory, make certain changes in the machinery, and bring the chocolate into the factory and render it there. There seems to be no dispute of the fact that they agreed to pay $150.00 a month, as rent, for the period covered by their use of the factory for that purpose.

It is the further claim of the plaintiff that at the time this arrangement was concluded, one of the defendants asked the plaintiff to take charge of the rendering of the

their business is to see that it be which not effectively employed.
The issue was submitted to a jury and resulted in a verdict
for the plaintiff and assessment of his damages for the full
amount claimed, - $1000.00, for which the court entered
judgment against the defendants, it appears that they have
satisfied this judgment.

It appears from the record that the plaintiff had
the, Sheridan, was also, besides [illegible] a [illegible],
manufacturing carriage shop, also a factory located at Fifty Nine
Street, in the City of Chicago. Apparently the Stock Bar was
interfering with their supply of black tan, and in the spring
of 1918 they were not doing much business.

The defendant particularly was in the business of
supplying hammer blocks of black tan which [illegible]
[illegible] that had heated the plaintiff that had been damaged.
In the spring of 1918, the Standard Carriage Company, in the State
of Pennsylvania, was formed, and owns a million pounds of
[illegible] and [illegible] in the Pennsylvania [illegible]
on this [illegible] which [illegible] and [illegible].
The defendants attempted to [illegible] this [illegible] in [illegible]
[illegible] of the Stock Yards in Chicago, but [illegible] [illegible]
[illegible]. They [illegible] [illegible] the plaintiff
[illegible] work on [illegible] [illegible] [illegible] [illegible]
the factory, [illegible] [illegible] in the [illegible], and [illegible]
the [illegible] [illegible] the factory [illegible] [illegible] [illegible]. There [illegible]
to be no [illegible] of the [illegible] [illegible] [illegible] [illegible]
a [illegible], [illegible] [illegible] [illegible] [illegible] [illegible]
factory for that purpose.

It is the further claim of the plaintiff that as by
the [illegible] [illegible] [illegible] [illegible] of the defendants
[illegible] the plaintiff [illegible] [illegible] [illegible] [illegible]

chocolate for them but that he declined at first; that in this connection the defendant Fox told him that the only man the defendants had who was capable of handling this chocolate proposition, was their foreman and that he had been drawn in the draft and would doubtless have to go into the Army shortly. The evidence shows that this foreman or superintendent did enter the Army in June of that year. It is the further contention of the plaintiff that after some talk, back and forth with Fox, an agreement was entered into, whereby the defendants were to pay him $150.00 a month for his services and that the plaintiff was to give the defendants such time as he could beyond that which might prove necessary to look after his own business, and further, that he had worked for the defendants in connection with the rendering of this chocolate for an average of six or eight hours a day over the period of time above referred to. There was one witness who testified in support of the plaintiff.

On the other hand, the defendants testified that no agreement was ever made at any time with plaintiff, concerning his performing any services for them, and that they never had any idea that the plaintiff was claiming that they owed him anything for services until sometime in March, 1918, when they received a statement and a letter from McCullough & Company, covering certain replacements of machinery, which had been necessitated by the defendants use of the factory of McCullough & Company, and also, for the services of McCullough from May 1, to January 1. There were two witnesses who testified in support of the defendants.

No useful purpose would be served in detailing the evidence in this opinion. It is in hopeless and direct

absolutely for them but just be doubtful if first. That is true concerning the Germans for fear that the only man the Germans but who for capacity to handling this [illegible] propositions, was Count Ferenck and that he had been seen in the days and would continue here to go into the Army shortly. The evidence shows that this person is supposedly his under the Army in July of that year. It is not further [illegible] of the activity that other have said, but the Jews with Ben, as appeared but another Jew, Dunsky, the defendants were to pay the Ben Ziv, of a motor car in activity and that the activity was to pay all informants with [illegible] so to until beyond that time that only [illegible] necessary to keep after his [illegible], and further, was to [illegible] for the defendants in connection with the receipt of this commodity for an average of six or eight hours a day over the period of time above referred to. There was no [illegible] and [illegible] in support of the activity.

On the other hand, the defendants testified that [illegible] the activity, for [illegible] of the Jews in Palestine. Witnesses had [illegible] the [illegible] for them, and that they never had any idea that the activity was violating that law was the [illegible] for [illegible] in Berlin. Also, when they received a shipment and a letter from Rudolfinger & Company, [illegible] relative to [illegible] of machinery which had been [illegible] by the defendants the [illegible] of the factory or Rudolfinger & Company, not [illegible] the services of Rudolfinger from Bry is in Germany. There were no [illegible] are [illegible] in support of the defendants.

Do twelve jurymen think Mr. Murphy is guilty of the offense in this opinion. It is for jurymen and lawyer

conflict. In support of their contention that the verdict and judgment are contrary to the manifest weight of the evidence, the defendants call our attention to the case of Peaslee v. Glass, 61 Ill. 94. We have frequently had occasion to point out that the case thus cited does not state the law in this State. Hately v. Kiner, 168 Ill. App. 543; First State Bank of Plano v. Isaacs, 231 Ill. App. 658; Sears Roebuck & Co. v. Mears Slayton Lumber Co. Ill App. Ct. First Dist. No. 27188, Opinion filed Oct. 18, 1927. Even where the testimony of the plaintiff is without corroboration and that of the defendant is corroborated, by unimpeached witnesses, it does not necessarily follow that a verdict and judgment for the plaintiff will be set aside by this court as being against the manifest weight of the evidence. Van Meter v. Lambert, 104 Ill. App. 465. Before this court will disturb a verdict and judgment of the trial court on the facts, it must appear that such verdict and judgment are clearly and manifestly against the weight of the evidence. That rule requires no citation of authorities. It is of course not sufficient, to bring a case within the rule, that the party in whose favor the verdict has been returned and the judgment entered, was supported by fewer witnesses than the other party, nor will this court be justified in reversing a verdict and judgment on the facts, even if, upon our reading of the testimony in the record, it may appear to preponderate against the finding of the jury, and the action of the trial court in supporting it, unless it so far preponderates as to enable this court to say that such preponderance is clear and manifest. In our opinion, that situation is not presented by the evidence in this record.

credible. In support of this motion the jury the testimony and judgment are contrary to the manifest weight of the evidence, the defendant will not attempt to do more of Tomlins v. Owens, 41 Ill. 63. It has frequently been decided to point out that the mere fact alone does not invalid the jury in the case. Bunce v. Tiede, 247 Ill. 490. See Illinois Bloom v. Pinson, 241 Ill. 197. Owen v. Hunt, 8 Ill. Optical Fine Co. Ill App. 67. Wind Ohio, 80. (1918). Even where the testimony of the plaintiff either contradicting and that of the defendant is unreasonable, or improbable, however, it does not necessarily follow that a verdict and judgment for the plaintiff will be set aside upon the ground of the evidence. Van Buren v. Lowery, 3 Ill. App. 441. Before this court will attempt a weighing and judgment of the trial court on the facts, it must appear that such verdict and judgment are clearly manifestly against the weight of the evidence. That is the rule in the affirmation of verdictions. It is of course not sufficient to prove a mere rather the case, but it must be shown that the verdict has been reviewed and the judgment reversed, the supported by some evidence that the same exists. It will not must be justified in reversing a verdict and judgment on the facts, even if, upon the reading of the testimony in the record, it may appear to preponderate against the finding of the jury, and the action of the trial court in supporting it, unless it is the preponderance is so small that it may be say that such preponderance is clear and manifest. In the case, that evidence is not presented by the decision in the record.

The defendants further contend that the trial court erred in sustaining objections to their offer in evidence of the statement and letter referred to above, which was received by one of the defendants in March, 1919. In support of this contention it is argued that this statement and letter were material in that they tended to show that the presentation of this bill was the first time that a request for payment for the services claimed to have been rendered by the plaintiff, had been made, whereas the plaintiff testified to the contrary. In our opinion, the statement and letter cannot be considered as indicating anything either one way or the other, as to whether the plaintiff had demanded payment for his services from the partnership on the occasions testified to by him, and we are, therefore, of the opinion that the court did not err in this ruling.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, J. concurs.

O'CONNOR, J. dissents.

359 - 27317.

THE PROTESTANT WOMEN'S NATIONAL ASSOCIATION, a Corporation, et al.,

Appellants,

v.

JENNIE F. TURPIN, et al., On appeal of Ettie Elkins, et al.

Appellees.

APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The Protestant Women's National Association is a corporation, not for profit, organized under the laws of Illinois. Among other activities, it conducts a Home for Dependent Protestant Children in the City of Chicago.

At an annual meeting of the Association, held in 1919, officers were duly elected, Mrs. Turpin being elected president and other women being elected to fill the other offices. We shall refer to this set of officers as the Turpin officers. At this election Mrs. Ida M. Stephens was elected second vice-president. The Board of Directors of the Association consisted of the officers and the chairmen of the several committees. Five members of the Board of Directors constituted a quorum, under the terms of the By-laws.

Section 4 of Article 3 of the By-laws provided that "the Board of Directors shall meet monthly and at the call of the president or be called by her upon request of three members of the Board". At a meeting of the Board of Directors held in October, 1919, a resolution was adopted to the effect that "the Board of Directors meet the first Friday of each month at 2 P.M.

in the Auditorium Hotel parlors", and each member of the Board was notified by the corresponding secretary of the fact that this action had been taken.

It was further provided by the By-laws in Article 2, that regular meetings of the members of the Association should be held on the second and fourth Thursdays of each month and that the first meeting in June was to be the annual meeting. While the By-laws did not specifically specify the length of the terms for which the officers were to be elected, they did so indirectly, for Section 1 of Article 3, provided that the officers were to be elected by ballot at the annual meeting of the Association in June, and in other parts of the By-laws reference is made to the annual election of officers.

Following the election of the Turpin officers, a drive for funds and new members was commenced and headquarters for the drive were established in Room 1128 of the Masonic Temple Building in Chicago. During the fall of 1919 and the winter of 1920, the Board of Directors met as provided in the resolution above referred to, on the first Friday of each month in the Auditorium Hotel parlors. The March meeting, however, was held at the drive headquarters in the Masonic Temple, for the purpose of checking up the records on the campaign for funds. This change in the place of meeting of the Board was not objected to by anybody. On the 20th of the same month, a special meeting of the Board was held at the Home for Dependent Protestant Children, which was maintained by the Association at 6333 Yale Avenue, in the City of Chicago. In January, 1920, provision was made for holding the meetings of the members of the Association on the second and fourth Thursdays of each month, at 19 West Adams Street, in a hall referred to as Liberty Hall.

It appears that along in March 1920, some friction

developed among the officers and members of the Board of Directors and it was by reason of this that the special meeting of the Board was held on the 30th of the month. This meeting was not called by Mrs. Turpin but by Mrs. Stephens, who was then acting as first vice-president. She apparently acted under the claim that Mrs. Turpin was then absent from the City, although the latter testified that such was not the fact.

The regular April meeting of the Board of Directors was to be held on the second of that month. A few days prior to that date, Mrs. Turpin, the President of the Association, requested the corresponding secretary, Mrs. Brough, to send notices to the Directors, to the effect that the April meeting would be held in the Masonic Temple, as the March meeting had been. Mrs. Brough refused to send out such notices, and under date of March 31, she notified Mrs. Turpin, in writing, that a change in the place of meeting of the Board of Directors could not be made legally unless the consent of all the members of the Board of Directors was secured and that in the absence of such consent, she deemed it her duty to notify the members that the meeting would be held in the regular designated place. Accordingly, the corresponding secretary sent notices out to the members of the Board of Directors to the effect that the regular meeting of the Board would be held, April 2nd at 2 P. M. at the Auditorium Hotel parlors. Thereupon, the President of the Association, Mrs. Turpin, sent outnotices to all directors, designating Room 800 in the Masonic Temple Building as the place of meeting of the Board, on the regular meeting day, April 2, at 2 o'clock P. M.

Two groups of Directors met at the time for which these meetings were called, Mrs. Turpin and five other Directors meeting in the Masonic Temple Building, and Mrs. Stephens, Mrs. Brough,

meetings among the citizens and members of the Board of Education and at one by reason of this that the apparent meeting of the Board was held at the home of [illegible]. This meeting was not called by Mrs. [illegible] but by Mrs. [illegible], who was then acting as first vice-president. She apparently acted under the claim that Mrs. Tuttle was then absent from the city, although the record testified that such was not the fact.

The regular April meeting of the Board of Education was to be held on the second of that month. A few days prior to that date, Mrs. Douglas, the President of the Association, requested the corresponding secretary, Mrs. [illegible], to send notices to the directors, to the effect that the April meeting would be held in the Masonic Temple, in the [illegible] parlor [illegible]. Mrs. [illegible] refused to send any such notices, and under date of March 31, she notified Mrs. Douglas, in writing, that a change in the place of meeting of the Board of Education could not be made legally unless the consent of all the members of the Board of Education had [illegible] in the [illegible] of such change, and [illegible] it was her duty to notify all members that the meeting would be held at the regular [illegible] place. Accordingly, the corresponding secretary sent notices out to the members of the Board of Education to the effect that the regular meeting of the Board would be held, April 2nd at 2 P. M. at the [illegible] parlors. Thereupon, the President of the Association, Mrs. Douglas, sent notices to all directors, designating Room [illegible] in the Masonic Temple building as the place of meeting of the Board, at the regular meeting time, April 2, at 2 o'clock P. M.

The groups of directors met at the time for which these meetings were called. Mrs. Tuttle and [illegible] directors meeting in the Masonic Temple building, and Mrs. [illegible], Mrs. [illegible]

and five others, meeting at the Auditorium Hotel parlors. It will be observed that a quorum was present at both meetings.

At the Auditorium meeting Mrs. Stephens presided. A motion was adopted approving the action taken by the secretary, in sending out notices calling the meeting at the Auditorium. By other motions duly passed at this meeting, the offices of President, Financial Secretary, and Treasurer were declared vacant and the corresponding secretary was directed to notify those holding such offices of their removal from office. This meeting then adjourned to meet at the Home of the Association on April 6, and at that adjourned meeting Mrs. Stephens was chosen as President of the Association, to fill out the unexpired term of Mrs. Turpin and likewise the offices of Financial Secretary and Treasurer were filled. We shall refer to these officers as the Stephens officers.

At the Masonic Temple meeting of the Directors, regular business was transacted. The Turpin Directors continued to hold meetings of the Board of Directors, both regular and special, at the Masonic Temple. Notices of these meetings were sent out previous to each meeting to all members of the Board, including the Stephens Directors. No notice of the adjourned meeting of the Stephens Directors, held April 8, was given the Turpin Directors.

On April 8, a regular members meeting of the Association was held at 18 West Adams Street, notices being sent out by Mrs. Stephens, the hour being fixed at 1:30 instead of 2 o'clock as was usual. This meeting was presided over by Mrs. Stephens. There is evidence tending to show that Mrs. Turpin attempted to preside but was prevented from

doing so. The minutes of this meeting show that the minutes of the previous members' meeting and several intervening directors' meetings, including the meeting of the Stephens Directors on April 2, and the adjourned meeting on April 6, were read and approved and further that a motion approving "the action of the Board of Directors to date be approved" was carried. It is the claim of the Stephens officers and Directors that the removal of Mrs. Turpin and the other two officers and the election or appointment of Mrs. Stephens and her associates to fill out their unexpired terms, was thus confirmed and established. It is the claim of the Turpin officers and directors that this meeting was in confusion from beginning to end, that it was not possible to know what was going on and that no effective action, of any kind, was taken by the members present at that meeting.

The Stephens Directors held a meeting May 7, and voted to dispense with the May meeting of the members of the Association, and a motion was adopted to the effect that the annual meeting of the Association be held at the Home of the Association on June 10, at 9:00 A. M. The Stephens Directors held a meeting on June 4. Both May and June meetings of this faction of the Board were held at the Auditorium Hotel parlor. No notices of the meetings were sent to the Turpin Directors. The Stephens faction sent notices to all Association members, designating the time and place of the annual meeting, as above stated.

At the May meeting of the Turpin Directors, Mrs. Turpin was directed to send notices to all members, designating Liberty Hall, 18 West Adams Street, and 10 o'clock A. M. on June 10, as the time and place of the annual meeting, and that was done.

A quorum of the members of the Association attended the Stephens annual meeting at the Home, on June 10, and a new set of officers were there elected for the ensuing year, headed by

Mrs. Stephens as President.

The lease which the Association had on Liberty Hall at 19 West Adams Street for certain days of the month, gave them the use of the Hall in the afternoon only. This prevented the Turpin faction from getting the use of that Hall on the morning of June 10, but they were given the use of Dewey Hall, adjoining, for their annual meeting. A quorum was present at this meeting also. A new constitution and set of By-laws were adopted. Officers for the ensuing year, headed by Mrs. Turpin, as President, were elected.

Up to this time the Stephens officers and directors had been in possession of the Home and the corporate records. On June 25, the Turpin officers and directors took possession of the Home and have since been in possession. They also demanded the books and corporate records from the Stephens officers and directors, which was refused.

The proceedings, resulting in the decree from which the pending appeal was taken, were based on an amended bill of complaint, as amended, filed by the Stephens officers and directors and the Association, through them, in which they set up the substance of the events above set forth, with others, and alleged that the Turpin officers and directors, and the Association, through them, who were made parties defendant, had collected large sums of money in the name of and for the use of the Association, and had failed to account therfor and had interfered with the complainants in the performance of their respective duties and with the business and affairs of the Association. The complainants prayed that the court find that they had been duly elected to the respective offices in said Association and that a mandatory and restraining injunction be issued requiring the defendants to deliver up

possession of the Home of the Association to complainants and to refrain from interfering with the business and the affairs of the Association and that an accounting be had of all moneys received by the defendants in the name of the Association and that defendants be decreed to pay to the Association, what, if anything, should appear, upon the taking of such account, to be due the Association.

The answers filed by the defendants admitted certain of the allegations of the amended bill of complaint, as amended, but alleged that the purported removal of the Turpin officers and directors was illegal and void, as was also the alleged ratification thereof by the members of the Association at the meeting of April 3, 1930. These answers further set forth the various meetings which had been held by the Turpin Directors, following April 3, and the annual meeting held by that faction on June 10, and the action of the members present at that meeting, and alleged that the defendants were the duly elected officers and directors of the Association and entitled to the possession of all the property of the Association and denied that complainants were entitled to an accounting or any other relief.

The defendants also filed a cross bill making substantially the same allegations as were contained in their answers and praying for practically the same relief as was prayed for by complainants, in their amended bill, as amended. The complainants filed their answers to the cross bill and replications were duly filed by both complainants and cross complainants.

The cause was referred to a Master and after a hearing, the Master found against the complainants and in favor of the defendants and cross complainants, and filed his report

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

accordingly. Objections and exceptions were overruled and the Chancellor confirmed the findings of the Master and entered a decree in accordance with the prayer of the cross bill, dismissing the bill for want of equity. To reverse that decree, the complainants have perfected this appeal.

The action of the Stephens Directors at their meeting held on April 2, in attempting to remove Mrs. Turpin and certain other officers was illegal and void. Those officers had been elected by the members of the Association, and, under the only reasonable construction to be given the various provisions of the By-laws, they were elected to hold office until the next annual meeting of the Association in June, 1900. But irrespective of the length of the term for which they were elected, or whether it was for any definite term, there was no power in the Board of Directors to remove the officers of the Association. Those officers derived their title to the offices the held and all rights incident thereto, from the same source as did those directors who were not officers, namely, the membership of the Association, and they could be removed only by the power that created them. 7 R. C. L. Sec. 418; Morawitz on Private Corporations, Vol. 1, 2nd Edition, Sec. 341, p. 318; 10 Cyc. 743; Brindley v. Walker, 231 Pa. St. 387; Commonwealth v. Detwiller, 131 Pa.St. 614.

There is no provision in the statute of this State and there is none such to be found in the Constitution and By-laws of the Association here involved, giving the Board of Directors any such powers. Similarly, the action of the same directors at their meeting held on April 6, by which they attempted to elect or appoint officers to fill the vacancies they had attempted to create by their action of April 2, was illegal and void.

But complainants contend that all things done by their

essentially. Different are conditions under overlying and the
associated conditions the limitation of the number has adopted a
course as consistent with the interest of the owners of oil, the-
measure the bill for each of owners. In reverse has become,
the complainants have protested this request.

The motion of the Kingdom Tuscarora in their meeting
held on April 2, in accordance to Crowe Act, Turpin and certain
other officers has illegal and void. These officers has been
elected by the members of the Association, and under the only
requisite constitution is to allow the Indian protection of the
Kingdom, they have landed in this office until the next annual
meeting of the Association in June 1920. But independently of
the legality of the case (it still has very serious doubts, if Congress
is not for its Indian laws, have the power to grant to the Kingdom
of Tuscarora a power the officers of the Association. These
officers derive such title in the Indian the fact not all
eligible Indians voting. Then the Indian voting on the issue
attorney was very not efficient, namely, the membership of
the Association, not only small by comparing only by the power
that voting them. I. P. O. Is Kin. Only Kingdom of Tuscarora
Organization, Vol. 1, Ind Edition, Kan. Kin. 2, 1919 in Ind.
Vol. Berkley v. Kinney, 20 Kan. 21, 1877, Kansas Trust v.
Kansas, 140 Kan. 21, 1934.

There is no problem in the counting of the Indian
and there is some work to be done in the Constitution and Bylaws
of the Association have failed, since the Kingdom of Tuscarora
was such power. Similarly, the action of the same Congress
as that concerned land on April 2, by which they attempted to
place an absolute attorney in fact for Tuscarora that the adjusted
is made by their action of April 2, not illegal and void.

The complainant stated that all things done by their

group of directors were confirmed and ratified by the action of the members of the Association at the meeting of April 8. In our opinion that contention is not sound. That meeting was not properly called nor conducted and any action that may have been taken there was void and of no effect whatever. The meeting was held pursuant to notices signed by Mrs. Stephens, as President of the Association, although she was not the president and had no legal right to act as such in any way whatever. Mrs. Turpin was the legally constituted president, and as such, had the right to preside over all the meetings of the Directors of the Association. That right was denied her, although she was present and claiming it, by the action of Mrs. Stephens and her associates at the meeting of April 8.

Moreover, even if it be assumed that the action purporting to have been taken at the meeting of April 8, was possible, and that the void acts of the directors (considering the Stephens group as the directors) could be ratified by a legally held and constituted meeting of the members of the Association, and if it be assumed that the meeting of April 9, was legally held and constituted, the burden was upon complainants to show that the acts of the meeting amounted to a ratification of the acts of the so-called directors. The Master found from all the evidence that such ratification had not been sufficiently proven and the chancellor confirmed that finding. It is entirely clear from the record that this meeting was held in great confusion, the extent of which is the subject of much conflicting testimony. That it must have been considerable is evident from the fact that there had been a sharp division among the officers and directors and drastic and high-handed methods had been pursued by the Stevens group in an attempt to oust the Turpin group; notices sent out for this meeting over the

name of Mrs. Stephens as president, called the meeting for 1:30 o'clock instead of 2 o'clock, the usual hour for members meetings to convene; some of the members of the Turpin group were challenged and their rights to attend the meeting questioned when they arrived at the door, and when Mrs. Turpin arrived, soon after the meeting began, she found Mrs. Stephens presiding, whereupon, she asserted her right to preside as the lawful president of the Association, and she attempted to exercise such rights, but was unsuccessful, being prevented from so doing by Mrs. Stephens. The record is not such that we can say that the findings of the Master and of the Chancellor, with regard to the action attempted at the meeting, are against the manifest weight of the evidence.

It follows from what we have already said, that Mrs. Turpin and her associates, whom the Stephens group attempted to remove, continued as legal officers of the Association until their successors were duly elected in June, 1930. There were two annual meetings of the Association held on June 10, both, according to the record, having a quorum in attendance. We are clearly of the opinion that the annual meeting held by the Stephens group was not, and that held by the Turpin group was, the lawful annual meeting of the Association. The meeting held by the Stephens group was based upon all the acts of that group of directors which had gone before. Those acts being null and void and of no effect, and their attempted election of officers being illegal, the actions of those officers can be given no effect, including the calling of the annual meeting to be held at the Home, and the action of Mrs. Stephens in presiding over it.

Mrs. Turpin continued to assert her right to act as President of the Association and as such to preside at all

meetings of directors, to send out notices of the annual meeting to all members and to preside at that meeting. All those functions belonged to Mrs. Turpin as the legal President of the Association, and all attempts to interfere with her, can be given no effect.

Mrs. Turpin, as the lawful President of the Association, was the only one entitled to preside at the annual meeting of the Association in June. The regular meeting place for members' meetings was at 19 West Adams Street, and that is where the meeting was held, pursuant to notices sent out to all members. We regard it of no importance whatever that the notices called for the meeting to be held in Liberty Hall, whereas it was held in Dewey Hall. The evidence shows without contradiction that those rooms are adjoining rooms on the same floor at 19 West Adams Street, and ample provision was made to advise anybody approaching Liberty Hall to attend this meeting, that it was being held in the adjoining room.

It is the contention of the complainants that inasmuch as the By-laws did not designate the place of holding the annual meeting, it was the duty of the directors to fix the place and that even if it be admitted that the action attempted in removing certain of the officers was of no effect, still a majority of the board of directors (the Stephens group of seven) had, at a meeting of the Board in May, designated the Home as the place of holding the annual meeting, and, therfore, it was incumbent upon the Association to hold its annual meeting there. For the reasons already set forth the attempt of the Stephens group to hold a directors meeting in May, were void and of no effect, as were all meetings of the board attempted by them. These meetings depended entirely upon the validity of the title of Mrs. Stephens to the office of President, which we have found

did not exist.

Beginning in January 1920, all members' meetings were held at 19 West Adams Street. The By-laws provided that the first members' meeting in June was to be the annual meeting. A meeting of Directors, presided over by Mrs. Turpin, the lawful President of the Association, at which a quorum was present, fixed the usual meeting place of the members, 19 West Adams St. as the place for the holding of the annual meeting.

It is the further contention of the complainants that inasmuch as the By-laws did not designate the time and place for the holding of the directors' meetings, the directors had the right to make such designation; that they had done so, fixing the first Friday of each month at 2. P. M. in the Auditorium Hotel parlor as the time and place for the holding of all directors' meetings; that all members of the Board were notified of this action and that thereafter no notices were required; that in view of this action of the Board of Directors, the president had no right nor power to designate some other place for the holding of the Board meetings, and, therefore, that her action in directing that meetings of the Board be held in the Masonic Temple Building, were illegal and void and that any action taken at such meetings was likewise void. We are unable to concur in that contention. The board of directors itself set a precedent for the holding of the regular meetings of the board at a place other than the one fixed by the resolution of motion which had been passed in October, 1919, by holding the regular March meeting of the Board in the Masonic Temple Building, without objection, on the part of anybody. By section 7 of article 1 of the By-laws it was provided that "the corresponding secretary shall upon the order of the president issue notices of all meetings". In

view of that, when the officer was directed by Mrs. Turpin, the president of the Association, to send notices of the April directors' meeting, to the effect that it would be held in the Masonic Temple Building, it was her duty to do so. There is no provision in the By-laws by which she could assume authority to pass upon the question of whether the directions of the president were legal or even proper.

Even if we assume that, by reason of the action of the board in October, in designating the place of holding meetings of the Board, and although that action had been departed from by the Board without objection from any member, in the holding of the March meeting, that the action of the President in directing notices to be sent out for the April meeting and designating the Masonic Temple Building as the meeting place, was without proper authority, nevertheless, if the Board met at the place designated, with a quorum present and either formally approved the place of meeting by a resolution or motion duly passed, or constructively took such action by functioning and doing business, no objection being raised by anybody at that meeting, by reason of the fact that the meeting was being held in a place other than the one specified in the October resolution, there would be no doubt of the fact that the meeting would be a legal and proper meeting. In our opinion the situation is not changed by the fact that the Stephens group of Directors were greater in number than the Turpin group. All meetings of directors presided over by Mrs. Turpin in April, May and June were attended by a quorum and at none of those meetings was any question ever raised as to the place of holding the meetings.

However, were we to assume that the meetings of the directors, presided over by Mrs. Turpin, at one of which the place

Year of Grace, some conditions are discovered by Mr. Tagore, the president of the Association, to hold sessions of the Annual Literary meeting, so the effort does it seem to hold in the Burmese Temple Building, it was not only so to us. There is no provision in the By-laws by which one could secure suitably to pass over the question of choosing the directions of the president were legal or even proper.

Then it is common fairly to remove of the notice of the Board to preserve, in consequence the cause of existing members of the Board, and difficulty that matters had been delayed from by the Burma Vernacular Magazine from any members, in the building of the Burma meeting, that the motion of the Burmese Bud in directing motions by to start not for the annual meeting and disregarding the Burmese Tag or building of the society Burma, was without proper authority, unconstitutional, of the Tagore and of the plans designated, with a certain Burmese and other Burmese supported the plans of meeting of . Individuals in matters fair present, it particularly that that motion by Tagore and Burmese are later Burmese, in Burmese meeting filled by majority of their matters, by reason of the fact that the Burmese the being fair is a place about that the are constituted in the Burmese resolution,there about to be meant of the fact that the meeting that be a legal and proper meeting. If the motion the alteration is not changed by the fact that the Burmese Burmese of Burmese with Burmese is meant that the Burmese meeting of Burmese presented was by Mr. Tagore in Burmese. Mr and that was carried by a person and is meant of that meetings was the question was meant to be the place of holding the meetings.

However, yet we is common that the meetings of the Burmese, presided over by Mr. Tagore, is not of which the place

for the annual meeting was fixed for 19 West Adams Street, were irregular, in that the meetings were held at a place other than the one designated by the action of the Board in October, and that, therefore, the action taken in fixing 19 West Adams Street as the place of the annual meeting, was irregular, that irregularity was wholly obviated when such annual meeting was actually held on notices signed by the lawful president, that place being the regular place for the holding of all members' meetings, the meeting being presided over by the lawful president, with a quorum present and no objection being raised that there had been any irregularity in fixing the place of the meeting.

That annual meeting proceeded to do business, as above stated, without objection being interposed by anybody. It is our opinion that the officers there elected for the ensuing year were regularly and legally elected. These officers and directors are the defendants and cross-complainants.

For the reasons above set forth, the decree, dismissing the bill of complainants for want of equity and awarding the relief prayed for by defendants and cross-complainants is affirmed.

DECREE AFFIRMED.

TAYLOR, J. and
O'CONNOR, J. concur.

378 - 27336

BARNEY BLACK, Appellee, v. WILLIAM GOLDMAN, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a forcible entry and detainer proceeding, in which the issues were submitted to a jury and by them found for the plaintiff, Black. Judgment for possession followed, to reverse which the defendant has perfected this appeal.

There is no bill of exceptions in the record. The sole grounds urged for a reversal of the judgment are: First, that the summons was void in that not sufficient time elapsed between the date of its service and the return day, and, second, that the complaint is insufficient in that it gave the street number of the premises in question but did not recite that they were located in the City of Chicago.

These points were not raised in any way in the trial court, either by any preliminary motion or any motion in arrest of judgment. On the contrary, the defendant duly filed his appearance, demanded a jury, and went to trial on the merits. Irrespective of the question of whether the defendant might properly have complained of either of the matters above referred

to, he is in no position to do so now.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

420 - 27378

RICHARD WEXLER, et al, Appellants, v. PUBLIC STATE BANK, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

In June 1920, the plaintiff Wexler was a resident of Chicago and the other plaintiff, Channin, lived in Poland. They were cousins. Wexler desired to send Channin $25.00 and get it over to him as quickly as possible. To that end, he arranged to have the defendant bank forward the money, and he gave the bank his check for $29.68, for the purpose. At that time the bank gave him a receipt for the money containing the name and address of the one to whom the money was to be sent. The money was never delivered to Channin. In due time he came over to this country, and the two plaintiffs then sued the bank, jointly, claiming that the bank had been requested to return the money, but had refused to do so.

The statement of claim filed by the plaintiffs set forth the substance of the above facts. The defendant filed no affidavit of merits. The case was presented to the small claims branch of the Municipal Court, where no affidavit of merits is required.

To support the case of the plaintiffs, Wexler testified that he gave his check to the bank for the purpose stated and

RICHARD WENZLER, et al,

appellees,

AMERICAN FROM

v.

MUNICIPAL COURT

OF CHICAGO.

PEOPLES STATE BANK,
a corporation,

appellee.

MR. PRESIDING JUSTICE TRUMBOW delivered the opinion of the court.

In June 1920, the plaintiff Wenzler was a resident of Chicago and the other plaintiff, Ulemnia, lived in Poland. They were cousins. Wenzler desired to send Ulemnia $25.00 and get it over to him as quickly as possible. In that end, he arranged to have the defendant bank provide the money, and he gave the bank his check for $25.00 for the purpose. At that time the bank gave him a receipt for the money containing the name and address of the one to whom the money was to be sent. The money was never delivered to Ulemnia. In due time he came over to this country, and the two plaintiffs then sued the bank, jointly, claiming that the bank had been requested to return the money, but had refused to do so.

The statement of claim filed by the plaintiffs set forth the substance of the above facts. The defendant filed no affidavit of merits. The case was presented to the small claims branch of the municipal Court, where no affidavit of merits is required.

To support the case of the plaintiffs, Wenzler testified that he gave his check to the bank for the purpose stated and

received its receipt therefor. Both the check and the receipt were received in evidence. At the bottom, on the face of the receipt appeared the words, "Subject to conditions set forth on other side." On the reverse side of the receipt a number of conditions are set forth. One was to the effect "that it is expressly agreed that the Public State Bank acts as agents only for the sender." Another provided that "all claims, in case of loss of money, are to be adjusted only when the amount is returned to the Public State Bank from the European P.O. or Bank." The plaintiff Channin testified that he never got the money. After introducing this evidence the plaintiffs rested. At this point the defendant moved the court to find the issues in its favor and enter judgment accordingly, on the ground that it was apparent from the evidence which had been introduced, that Channin had no claim against the bank, and inasmuch as Wexler and he had sued jointly, the plaintiffs had failed to prove their case, The court indicated that the defendant's motion was a proper one, when counsel for the plaintiffs observed that they could dismiss one of the two parties out of the suit, "if they make the proper motion." The defendant made no motion and the plaintiffs made none, and the court proceeded to find for the defendant and judgment was entered accordingly, to reverse which the plaintiffs have perfected this appeal.

The plaintiffs were apparently improperly joined, as such, in bringing this suit. Why counsel for the plaintiffs was unwilling to eliminate Channin from the case, unless the defendant made "the proper motion", is not clear. This case, having been presented to the small claims branch of the Municipal Court of Chicago, where pleadings either formal or informal, are for the most part done away with, and where all the procedure is informal, the trial court should have brushed aside all the

received its receipt therefor. Both the check and the receipt were received in evidence. At the bottom, on the face of the receipt appeared the words, "Subject to conditions set forth on other side." On the reverse side of the receipt a number of conditions are set forth. One was to the effect "that it is expressly agreed that the Public State Bank acts as agents only for the sender." Another provided that "all claims, in case of loss of money, are to be adjusted only when the amount is returned to the Public State Bank from the European P.O. or Bank." The plaintiff Chunnin testified that he never got the money. Many interesting this evidence the plaintiff proved. At this point the defendant moved the court to find the issues in its favor and enter judgment accordingly, on the ground that it was apparent from the evidence which had been introduced, that Chunnin had no claim against the bank, and inasmuch as Wexler and he had sued jointly, the plaintiffs had failed to prove their case. The court indicated that the defendant's motion was a proper one, when counsel for the plaintiffs observed that they could dismiss one of the two parties out of the suit, "if they make the proper motion." The defendant made no motion and the plaintiffs made none, and the court proceeded to find for the defendant and judgment was entered accordingly, in accord with the plaintiffs were petitioned into court.

The plaintiffs were apparently improperly joined, so much, in bringing this suit. Why counsel for the plaintiffs was unwilling to eliminate Chunnin from the case, unless the defendant made "the proper motion", is not clear. This case, having been presented to the small claims branch of the Municipal Court of Chicago, where pleadings either formal or informal, are for the most part done away with, and where all the procedure is informal, the trial court should have brushed aside all the

formalities and gone to the merits of the matter. It is perfectly plain that Wexler having turned this money over to the bank to be forwarded to Chamnin, and the latter never having received it, the bank must either return it or account for its failure to do so.

The judgment of the Municipal Court is reversed, and the cause remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED

TAYLOR AND O'CONNOR, JJ. CONCUR.

formalities and come to the merits of the matter. It is particularly plain that Wanjer having turned this money over to the bank to be forwarded to Ghanaim, another letter never having received it, the bank must either return it or account for its failure to do so.

The judgment of the Municipal Court is reversed, and the matter remanded to that court.

DOUGLASTOWNSEND, AD. JUDGE MAGISTRATE

TAYLOR AND O'DONNEL, JJ. CONCUR.

464 - 27422.

HARRY W. NICHOLS, doing business as The Nichols Investigating Agency, Appellee, v. JOHN J. GARRITY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Garrity seeks to reverse a judgment for $244.95, recovered by the plaintiff in the Municipal Court of Chicago.

The Garrick Theatre Company is an Illinois corporation controlling the Garrick Theatre in the City of Chicago. The Jackson Theatre Company is another Illinois corporation controlling the Studebaker Theatre and the Princess Theatre, in the same city. The defendant Garrity was in the employ of these two corporations, in the capacity of a theatre manager. From the evidence in the record, it appears that itis the custom of the theatres referred to, as well as others in the City of Chicago, to have their bills or advertisements posted or placed by men working as bill posters. Under this custom the bill posters are given orders for theatre tickets, and when anyone owning or controlling the premises in which the posters desire to place the bills or advertisement, grant them such privilege, they are authorized to give such person one of these orders on the theatre involved, for tickets to one of performances. This plan contemplates that these orders

shall be used by no person except the individual receiving them in exchange for advertising privileges. But it appears that there has been frequent misuse of these orders, either on the part of the bill posters who have them in their possession or those receiving them in exchange for advertising privileges, or both, and this has occasioned much loss and annoyance to the theatres.

One of the plaintiff's operatives procured one of these orders for theatre tickets, apparently purchasing it from a bill poster for a small sum, and it came into the plaintiff's possession. It was an order on the Studebaker theatre. Apparently the plaintiff conceived the idea that he might get some business for his agency by taking the matter up with that theatre and inducing them to employ him in making an investigation as to the extent of the use of these orders, and in devising ways and means of bringing about a discontinuance of such use. The plaintiff testified that with this thought in mind he went to the box office of the Studebaker Theatre and exhibited this theatre order, which had come to his possession, and he asked the person in charge of the box office who he could take the matter up with, and he was advised to see the defendant, Mr. Garrity, who could be found in the Garrick Theatre Building. Thereupon, the plaintiff called at the office in question and talked with the defendant. The facts thus far related are apparently not controverted.

The plaintiff testified that he told the defendant abot procuring the order above referred to, and asked him if he wanted the matter investigated, and the defendant said this

shall be done by an person except the individual producing the in advance the interfering publicity. So it appears that there has been frequent misuse of their names, either on the part of the bill posters who have them in their protection or those providing them in advance for advertising privileges, or both, and this has occasioned much loss and annoyance to the theatres.

The Mr. GLASGOW's suggestion presented one of those states for Tuesday bidding, especially as from a bill poster for a small sum, and it goes into the plaintiff's possession. It was we state to the defendant theatre. Apparently the plaintiff considered the idea that he might get some business for his company by making the matter up with this theatre and inducing them to employ him in making an investigation as to the extent of the use of their name, and in devising ways and means of bringing about a discontinuance of such use. The plaintiff testified that with this thought in mind he went to the box office of the defendant theatre and exhibited this theatre order, which had come to his possession, and he asked the person in charge of the box office who he could take the matter up with, and he was referred to one the defendant, Mr. Martin, who could be found in the Martin Theatre Building. Thereupon, the plaintiff called at the office in question and talked with the defendant. The facts thus far related are adequately not contradicted.

The plaintiff testified that he told the defendant that producing the order above referred to, and asked him if he needed the orders investigated, and the defendant said that he would be glad to have it done.

custom involving advertising orders for seats was costing the theatres thousands of dollars a year and he was interested in having the matter investigated; that the plaintiff told him that he would need to use two men, at a cost of $8.00 per day and expenses, and that the defendant told him to go ahead with the investigation and advised him that the bill posters started out from the Studebaker Theatre every morning at 8 o'clock, and he gave the plaintiff the names of several of them; that the plaintiff's agency then proceeded with the investigation, consuming some 45 days; that he reported to the defendant, from time to time, but the defendant directed him to proceed with the investigation until he was through, without making further report until that time; that at the time the plaintiff was directed by the defendant to make the investigation, the defendant did not state what corporation or individual he was connected with, if any, - that this question never arose; that the investigation began October 27, and continued up to December 5, 1919; that when the defendant engaged the plaintiff to make the investigation, the plaintiff told the defendant that he "would hold him responsible for that bill, and he said, all right, that the other theatres may help to pay for the investigation."

At one point in his cross-examination, the plaintiff stated that during the time this investigation was going on he was under "the impression that he (Garrity) owned the theatre",- presumably the Studebaker. Previous to that point in his cross-examination, the plaintiff was asked "At the time you talked with Mr. Garrity, you knew that he was the manager of these theatres, did you not?" and he answered, "I knew that he was the manager of these theatres" and he then added that he did not know that what Garrity was doing with regard to this matter was in the

making inviting advertising [illegible] for money was dealing the
Universe Insurance it failure a great man he was interested in
having the police investigated; that the plaintiff told the
[illegible] to which used to use the word of [illegible] and
and expenses, and that the defendant told him to go ahead with
the investigation and advised him that the bill passing charged
was from the "Lakeshore Electric Street Railway" [illegible],
and he gave the plaintiff the name of someone at Sarnia
the plaintiff's agency then presented with the investigation,
assuming some 40 days; that he appeared to be [illegible], from
time to time, but the defendant directed him to proceed with
the investigation until he was already, [illegible] waiting [illegible]
report until that time; that at the time the plaintiff was
directed by the defendant to make the investigation, the de-
fendant did not state what corporation or individual he was
[illegible] [illegible], if any, - that this question began about
the investigation began October 27, was continued up to December
8, 1919; that when the defendant engaged the plaintiff to make
the investigation, the plaintiff told the defendant that he
"would hold him responsible for what bill," and he said, all
right, that he (the defendant) may bill to you for the investi-
gation."

At the point in the [illegible], the plaintiff
stated that during the time the bill investigation was going on he
was making "the [illegible] bill the [illegible] [illegible]",
presumably the defendant. Proceeding to that point in his examin-
ation, the plaintiff was asked "At the time you talked with
Mr. Bartlett, you knew that he was the manager of these insurance,
did you not?" and he answered, "I knew that he was the manager
of these companies" but he also added that he did not know that

capacity of manager of the theatres. The plaintiff further testified, on cross-examination, that after he had started his investigation of the activities of the bill posters in these orders, he had another talk with the defendant telling him that inasmuch as all the theatres would benefit by this investigation they ought to share their proportion of the expense incident to the investigation, and that Garrity then gave him the names of the various theatre managers connected with the other theatres and he then called on these other managers, and apparently understood from them that they would pay their shares, and he billed them accordingly, but they refused to pay, whereupon, on the theory that the defendant was personally liable for all the expense of the investigation anyhow, the plaintiff sent him a bill for the entire amount involved, which was $417.55, this bill being sent under date of January 17, 1920.

It appears further that after this investigation was concluded the plaintiff submitted a plan whereby he thought the theatres could keep a constant check on the matter of the use of these orders, and prevent their improper use. This plan was submitted by the plaintiff to the defendant "and other Chicago theatres" at a suggestion of a representative of the Columbia Amusement Company from New York. The copy of the plan sent to the defendant was sent under date of March 9, 1920. The plaintiff testified that he was interested in getting at least 10 theatres to adopt this plan and employ him in that connection, at the rate of $10.00 per week each.

Itappears that about a week after the plaintiff began to investigate the use of these theatre orders, he was directed by the defendant, Garrity, to shadow a certain employee of the Studebaker Theatre Company, employed in the cashier's office

company or manager of the theatre. The plaintiff further testified, on cross-examination, that after he had started his investigation of the activities of the bill posters in these cases, he was unable to tell the defendant selling him that amount on all the theatre posts bearing on this investigation that might be shown their participation of the expense incurred in the investigation, and that further than the fact the owner of the various theatre properties operated with the other theatres and he then relied on their other managers, not especially mentioned from time that they would pay their share, and he billed them accordingly, but they refused to pay, whereupon, on the theory that the defendants was personally liable for all the expense of the investigation engaged, the plaintiff sued for a bill for the entire amount involved, which was $[illegible], that being just under half of January 17, 1920.

It appears further that after this investigation was concluded the plaintiff submitted a plan whereby he thought the theatres would keep a constant check on the matter of the use of these posters, and prevent their improper use. This plan was rejected by the plaintiff in the defendant "not wishing to continue therewith as a suggestion of a representative of the Columbia Amusement Company from New York. The copy of the plan sent to the defendant was sent under date of March 8, 1920. The plaintiff testified that he was interested in getting a fund to therefore in adopt this plan and employ him in that connection, at the rate of $10.00 per week cash.

Disappointed that there was not after the plaintiff began to investigate the use of these theatre posters, he was directed by the defendant, Smith, to make a certain employee of the

at the theatre of that name. This work was done and a bill for the same was submitted to the defendant by the plaintiff. The plaintiff wrote the defendant a letter, which does not bear a date, but which apparently was written a few days before December 11, 1919, which would be after the investigation as to the use of orders for tickets by the bill posters, was concluded. This letter bearing the plaintiff's personal signature was addressed "Mr. J. J. Garrity, Manager, Garrick Theatre, Chicago, Illinois." In this letter the plaintiff told the defendant that he had called upon all the managers of the various theatres in the loop district in Chicago, "as per your instructions", and he told him which ones were interested in the plaintiff's plan and which ones were not. He then added a paragraph at the end of the letter, apparently referring to the work done by his agency in shadowing the employee connected with the cashier's office of the Studebaker theatre, and said that he presumed the statement which had been forwarded in that connection, had been overlooked, and asked for an early remittance covering that account. The defendant replied under date of December 11, 1919, saying, "in regard to your bill at the Studebaker Theatre, I have O.K.'d it and put it through for payment by the management of that theatre, and it will probably come to you the beginning of this coming week." The plaintiff testified that that bill was paid by a check signed "Studebaker Theatre".

In testifying about the bill for $417.55, which plaintiff stated he had mailed the defendant, he presented a carbon copy which was received in evidence. The defendant testified that he had never received such a bill nor seen any like it until this carbon copy was produced in court. The defendant testified that when the plaintiff called upon him originally,

of the theatre at that time. This was done not only for the sake of the defendant in the information by the plaintiff, the "Liability" was the defendant's leaving, which she had been a date, but which apparently was written a few days before December 11, 1919, which would be after the investigation as to the use of cocaine for diets by the girl performers, was concluded. This letter bearing the plaintiff's personal signature was addressed "Mr. F. A. Davis", Manager, Gaiety Theatre, Saint-Hilaire." In this letter the plaintiff told the defendant that he had called up all the managers of the various theatres in the Loop district in Chicago, "to get your reinstatement", and he said his calls made were interpreted in the plaintiff's favor and which were very not. He then added a postscript to the end of the letter, apparently referring to the work done by his agency in blacklisting the employee mentioned at the plaintiff's office of the Cumberland Theatre, and said that he presented the letters which had been furnished in that connection, had been overlooked, and asked for an early consideration covering that account. The defendant replied under date of December 11, 1919, saying, "In regard to your call at the Studebaker Theatre, I have G.R.'d it and put it through for payment by the management of that theatre, and it will probably come in for the balance of this coming week." The plaintiff replied that the bill was paid by a check signed "Theatre Theatre".

In testifying about the bill for $117.50, which plaintiff stated he had called the defendant, he presented a letter and that this letter is evidence. The attorney testified that he did receive a bill per same and that it was paid this letter and presented to court. The defendant

and asked if he would be interested in an investigation of the abuse of the use of the orders for theatre tickets, in connection with their advertising, he said he would be, indirectly; that all the theatres were losing in this matter and all should be interested, and that it was a matter that ought to be taken up with the Chicago Theatre Managers Association; that he (the defendant) could not be interested in the matter singly or exclusively, and that he then suggested to the plaintiff "as that letter will show" (referring to the letter above indicated) that he call upon them and talk over his proposition with them. The defendant was asked whether the plaintiff stated to him at any time that he would hold the defendant personally responsible for the expenses incident to the investigation of this matter, and he said that he had not. He further testified that the first and only bill he had received from the plaintiff, in connection with the claim sued upon, was one dated April 1, 1920, amounting to $244.95. It appears from the record that this bill contained only a part of the items which had been included in the other bill testified to by the plaintiff, the latter bill containing, in addition to the items included in the bill of April 1, which apparently affected the Studebaker Theatre, some other items affecting other theatres in the City of Chicago, with which the defendant had no connection, such as Cohan's Grand Opera House and Woods Theatre. When this bill of April 1, was sent to the defendant, it was accompanied by a letter signed by the plaintiff and addressed to the defendant, in which the plaintiff said: "You will note that this investigation falls upon one theatre, althe' all are benefited and if it is your wish we will divide this bill equally among your three theatres, and you may advise us accordingly."

and using it he will be interested in an investigation of the abuse of the use of the screen for theatre,cinema, in connection with their advertising, he said he would be, himself, satisfied that all the theatres were losing in this matter and all should be interested, and that it was a matter worthwhile to be taken up with the Chicago Theatre Managers Association; that he (the Commissioner) could not be interested in the matter simply or exclusively, but that he was concerned in the protection "in that letter sill sense" interested in the public welfare. He said that he had not yet had his talk with the gentlemen with them. The Commissioner was asked whether he thought he could at any time that he would hold the defendant personally responsible for the expense involved in the investigation of this matter, and he said that he was not. He further specified that the first and only bill he has received from the plaintiff, in connection with the claim made upon, was one dated April 1, 1920, amounting to $444.00. At reasons from the record that this bill contained only a part of the items which had been included in the other bill specified to by the plaintiff, the latter bill containing, in addition to the items included in the bill of April 1, which apparently affected the Paramount Theatre, more than three different other theatres in the City of Chicago, with which the defendants had no connection, such as Comm's Grand Opera House and Uptown Theatre. When this bill of April 1, was sent to the defendant, it was accompanied by a letter signed by the plaintiff and addressed to the defendant, in which the plaintiff said: "You will see that this investigation falls upon one theatre, either all are taken and if it is your wish we will charge this bill equally among your three theatres, and you may advise us accordingly."

In the course of his testimony the defendant admitted that on one occasion, in connection with this matter of investigating the actions of the bill posters with regard to the theatre ticket orders, he told the plaintiff that he "would like to have him (the plaintiff) investigate what the bill posters of the Studebaker Theatre were doing with the orders and if he could, find out and give him a report on it; that report was to cover possibly two or three days. That is all. And I told him to go where he could find them, he didn't know where to go, and I told him the Studebaker Theatre bill posters left from that room", apparently referring to a room in the Studebaker Theatre lobby; and he told him the bill posters usually left the Studebaker Theatre in the morning.

There are a number of errors in the record, both in connection with the rulings of the court on admission of evidence and in connection with the instructions, which, in our view of the case, we need not refer to.

It seems entirely clear that the defendant, Garrity, was an agent and that he did direct the plaintiff to do some work in connection with the investigation in question. The only real question presented is whether the defendant is personally liable to the plaintiff for that work. As far as the direct testimony goes, we have the statement of plaintiff to the effect that the defendant expressly agreed to be personally liable, and we have the defendant's statement directly contradictory to that. If this were all that was to be found in the record on the subject, we would reverse the judgment of the Municipal Court and remand the cause for a new trial, because of the prodecural errors above referred to.

But there is a considerable amount of indirect testi-

In the course of his testimony the defendant admitted that he had assaulted, in connection with his version of intervening the actions of the bill jumpers with regard to the chemical stores owners, he said he personally felt he would like to have him (the plaintiff) investigate what the bill jumpers of the Gloucester Theatre were doing with his property and if he could, then one had give him a report on it; that report was to cover possibly two or three days. This he said. And I said that he (Jones) be given the first run, he didn't care which he got, and I told the Gloucester Theatre bill jumpers left from that room", subsequently referring to a room in the Gloucester Theatre lobby; and he said that the bill jumpers usually left the Gloucester Theatre in the morning.

There are a number of errors in the record, both in connection with the rulings of the trial in admission of evidence and in connection with the instructions, which, in our view of the case, we need not refer to.

It seems entirely clear that the defendants, merely, were in error and that in did cause the plaintiff to do some work in connection with the investigation in question. The only real question presented is whether the defendant is personally liable to the plaintiff for that work. In far as the claim against Jones, as here the representative of plaintiff, is the effort that the defendant expressly agreed to be personally liable, and we have the defendant's statement directly contradictory to this. If this were all that was to be found in the record on the subject, we would increase the judgment of the Municipal Court and instead the order for a new trial, because of the prejudicial errors above indicated.

But there is a considerable amount of implicit testimony

many in the record, consisting of admitted facts and circumstances, which, in our opinion, must lead to the inevitable conclusion that the defendant did not agree to be personally liable for this bill and cannot be so considered. That he was employed as the manager or agent of these theatres is apparent. That the plaintiff knew thatsuch was the case, would seem to be equally apparent. Indeed, in one place in plaintiff's cross-examination he states, in so many words, that he knew the defendant was the manager of these theatres, and in the very letter which the plaintiff writes the defendant, in which he sends him the bill covering the work done for the three theatres, for which the defendant was the manager, the plaintiff says, referring to this bill, that the expenses of this investigation falls upon "one theatre" although all three theatres for which the defendant was the manager were benefited, and the plaintiff offers to divide the bill equally among "your three theatres" if that is the defendant's desire. It is quite apparent that when that letter was written the plaintiff was not taking the position that he took in the trial of this case, namely, that the defendant was personally liable for those expenses, for if that were the case, he would never have written in the language above referred to.

In our opinion, there is not a single circumstance, among the many involved in this case, supporting the plaintiff's theory that the compensation due him for the services involved, is a liability for which the defendant may be personally held, or for which the defendant agreed to be personally responsible, but all of them point to the opposite conclusion. It would not seem possible for reasonable minds to differ on that proposition. Apparently the plaintiff's agency did the work about which he

has testified, and, as far as that work involved the three theatres for which the defendant was manager, it would seem, from the evidence contained in this record, that they might be liable, assuming the defendant was acting within the scope of his authority when he directed the plaintiff, as he admits he did, to check up on the bill posters working out from the Studebaker Theatre. If so, the plaintiff may duly recover such amount as may be involved in that matter from the corporations by which the defendant was employed. In view of the defendant's denial of the assumption of any personal liability, and the many circumstances indicating that he was acting as an agent, openly and under such circumstances that the plaintiff must have known that fact, we feel compelled to hold that the verdict of the jury and the judgment of the trial court, in this respect, are against the manifest weight of the evidence.

For the foregoing reasons, the judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant did not assume personal responsibility for the payment of the account sued upon; that whatever was done by him in that connection was done in the capacity of an agent, within the knowledge of the plaintiff.

TAYLOR AND O'CONNOR, JJ. CONCUR.

has qualified, and, so far as that work involved the time
limitations for which the defendants was responsible, it would seem,
from the evidence mentioned in this record, that they might
be liable, assuming the defendant was acting within the scope
of his authority when he directed the plaintiff, as he admits
he did, to shack up on the hall preparatory getting out from the
Blackwater Theatre. If so, the plaintiff may fairly recover
such amount as may be involved in that action from the pur-
poseless by which the defendant was employed. In view of
the defendant's denial of the assumption of any personal
liability, and the very reasonable inference that he
was acting as an agent, apparently and under such circumstances
that the plaintiff must have known that fact, we feel com-
pelled to hold that the verdict of the jury and the judgment
of the trial court, in this respect, are against the manifest
weight of the evidence.

For the foregoing reasons, the judgment of the
municipal court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant did not
assume personal responsibility for the payment of the account
sued upon; that statutory notice was given in this proceeding was
made in the capacity of an agent, within the knowledge of the
plaintiff.

TAYLOR AND O'BRIEN, JJ., CONCUR.

334 - 27292

AMERICAN CAN COMPANY, a corp., v. INTERNATIONAL ASSOCIATION OF MACHINISTS, et al, On appeal of AXEL KLEINSCHMIDT, Appellant, v. PEOPLE OF THE STATE OF ILLINOIS, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal Axel Kleinschmidt seeks to reverse an order or decree of the Superior Court of Cook County finding him guilty of violating an injunction issued in a labor controversy and committing him to the County jail of Cook County for a period of sixty days.

The record discloses that about September, 1920, employees of the American Can Company went on a strike. January 4, 1921, the company filed a bill which contained allegations usual in labor controversies between employer and employee. On the day following an order granting the injunction was entered and a writ awarded. Afterwards on April 26, 1921, complainant filed a petition in which it was alleged that Axel Kleinschmidt, and one Harry Serrall had violated the injunction of the court in that on the 19th day of April, 1921, they used or addressed the word "scab" and other vile and abusive names or words "importing hatred, criticism, censure or scorn" toward Albert G. Beckman, an employee of the American Can Company, and that at the same time

and place they assaulted Beckman severely injuring him. The petition prayed that a rule be entered on Kleinschmidt and Norrall to show cause why they should not be punished for contempt of court. A rule was entered accordingly and Kleinschmidt and Norrall filed an answer denying that they had addressed Beckman as a "scab" and denying that they had assaulted him. The matter came on for hearing before the chancellor and after the evidence was heard the court found Kleinschmidt and Norrall guilty of contempt of court, and ordered that each be committed to the County jail for a period of sixty days.

But two points are urged why the order or decree of the court should be reversed: (a) that the finding of the court is against the manifest weight of the evidence, and (b) that the court erred in admitting evidence on behalf of the petitioner.

(a) From the evidence it appears that there was a saloon and restaurant located at 1982 Clybourn avenue which was frequented by laboring men, many of whom were former employees of the petitioner but who at the time in question were out on strike; that about noon on April 19, 1921, a great many of these men were in the saloon drinking near beer and eating their lunch; that Albert Beckman, who was then working for the American San Company, went to the saloon for his dinner; that shortly after he entered Kleinschmidt and Norrall came in; that there were about twenty other men in the saloon or restaurant at that time, some of them drinking at the bar and others eating their lunch; that someone then called Beckman a "dirty scab" and there was considerable commotion; that it appeared that there was about to be trouble and Beckman started for the door, and that after he got outside he was assaulted by about four men; that he got away from them and

ran across the street when he was again assaulted.

Agnes Purtell testified that she was a cook and waitress working in the restaurant at the time in question; that Beckman came in a few minutes after 12 o'clock noon to get his lunch, and that the two respondents came in right after him; that one of the respondents, she could not say definitely which, in a loud voice cursed and swore at Beckman and that Morrall struck at Beckman but that the latter dodged and ran out the door followed by the respondents; that shortly after the respondents returned and she saw them in the saloon several times after that; that she had never seen either of them before the day in question.

Beckman testified that he was a machinists employed by the American Can Company and had been working there since about the middle of January, 1941; that on April 19, 1941, about noon he went to get his lunch at the saloon and restaurant on Clybourn avenue; that after he got there the two respondents came up near him and that Kleinschmidt said: "Gentlemen, this man is a Scab"; that the witness saw there was going to be trouble and started for the door; that he was followed by Kleinschmidt and Morrall and that after they got outside they, together with two others, struck and beat him with their fists; that he got away from them and ran across the street and some other men assaulted him; that he then went back to his place of employment and reported what had occurred; that about three weeks afterwards when he left his work he met Kleinschmidt on the elevated railroad; that they boarded a train and when it reached Irving Park Boulevard Kleinschmidt wanted to talk with the witness but the latter refused; that when the train had reached the Kobey Street Station the witness got off the train although this was not his destination

that as he was going through the turnstile Kleinschmidt asked him if he would not have a drink and a friendly talk; that the witness replied that he did not want to talk with him and kept going; that Kleinschmidt then said: "I'm going to get you" in a threatening way. The witness further testified that after April 19 he saw the respondents nearly every morning and night around petitioner's plant where the witness worked.

Guy D. Whiting testified that he was an attorney and that he saw Beckman about three o'clock in the afternoon of April 19 after he had been assaulted and that his face was badly swollen and black in places; that he went with Beckman to the saloon or restaurant where the trouble had started and that he saw Kleinschmidt there and when Beckman saw him he yelled out "There is the man that hit me." The witness further testified that he was connected with the solicitors for the petitioner and had been active in the case.

Walter W. Cole testified that he was a special deputy sheriff for the American Can Company since March 7 around its plant, and that he saw the two respondents nearly every day in that vicinity. He was then asked: "Now where did you see them, take up to April 19 and just prior to that date, where did you see them?" Objection was made that no charge of any violation of the injunction was alleged in the petition except that which occurred on April 19, and the evidence should be limited to that matter. The objection was overruled, the court stating that it was admissible "to determine a reasonable probability of guilt here." The witness then testified that he had ordered the two respondents away from petitioner's premises a number of times; that he had heard both of them on the street cars call employees of the petitioner "scabs". He further testified that on March 7, when he first came to the plant, the respond-

that as he was going through his journalistic Finanzministerium behind him if he would not have a drink and a friendly talk; that he answer replied that he did not want to talk with him and that finally that Finanzministerium then said: "I'm going to put you in a Konzentrationslager." The Gestapo threatening that after April 20 he was the responsible manager every morning and night among politicians where was his alcohol malaise.

Dr. A. Nazing testifies that he was an authority and that on two occasions when Hitler's visit in the direction of April 19 after he has been arrested in Jena his face was badly swollen and black in places; that he was sick because in the saloon or restaurant where the Gestapo had shouted and that he was Finanzministerium there and when Fachman was him he yelled out "Where is his face that his?." The witness further testified that he was connected with the publication in the newspaper and had been motive in the room.

Walter W. Jahn testified that he was a circuit legal adviser for the American Consulate since March 7 around the place, and that he saw the two representatives nearly every day in that vicinity. He was then asked: "Now where did you see them, take up to April 20 and just point to that date, where did you see them?" Objection was made that he should be of any violation of the Independence Adjudgment in the preliminary hearing that which existed on April 20, and the witness should be limited to that period. The objection was overruled. The trial judge ruled that it was admitted "he testified a reasonable probability of April 20." The witness then testified that on the arrival the Im Grundstück among Jena Jurisdiction's members a number of times; that he has been both at Jena on the street and said employees of the Gestapo "Nazis". In further testifying that on March 8, after the Gestapo came to Jena, the witness

ent Morrall was known as the captain of the picket squad and was standing in front of the plant picketing, and the witness ordered him away and that he saw Morrall pointing out the petitioner's employees who were passing to and from the plant; that he again saw Morrall there on April 15 doing about the same things that he had formerly observed. The witness further testified that he had been a special deputy sheriff at petitioner's plant in Chicago and Maywood for about seven months.

Kleinschmidt testified that he had formerly been an employee of petitioner for about fifteen years at one factory, and had worked for it about twenty-two years altogether; that he went on strike September 14, 1920, and that the strike was still in progress; that he first saw Beckman on April 19, 1921, in the saloon and restaurant on Clybourn avenue at about noontime; that before going into the saloon he was with Morrall looking over the commissary which was at Kleinschmidt's house where groceries were kept for the men who were on strike, and which was across the street from the saloon; that he and Morrall left the house and went into the saloon to get a glass of beer; that he saw Beckman standing at the bar; that there were a great many people in the saloon, teamsters and laboring men; that Beckman came up to him and the witness asked Beckman if he would have a glass of beer; that then "everybody hollered out 'that is a scab from the American Can Company;'" that Beckman then walked out the door and someone jumped on him across the street; that he did not hit Beckman at any time and that he did not call him a scab; that there was a large number of people in the street apparently running after Beckman; that the witness then turned and went back and got his glass of beer; that later that afternoon he saw Beckman and Whiting in the saloon; that

Mr. Darrell was having an hour outside of the palace guard and was standing in front of the plant yesterday, and the witness heard his army and that he was Darrell yelling out the politicians's supporters who were passing by on the line. He said he knew his army Darrell had to Alvil 22 doing every the same things that he had formerly observed. The witness further testified that he had been a special deputy sheriff in politicians's town in Chicago and depressed for about seven months.

Plaintiff's counsel in the interest that he [illegible] of political the Alvil Office party at the Chicago, and had voted for it since Washington (were objection) that he was in Dublin Delaware 14, 1867, and that her sister was still in prosecuted; that he first saw Dodson on April 22, 1924, in the saloon and restaurant on Diagonal street in about twenty-three years before going into the saloon he was with Darrell passing over the monument where we is Washington's house where grandma was born long ago the man was in uniform, in which was across the street from the saloon; then he was Darrell left; the house and went into the saloon to get a glass of beer; that he was further standing at the bar, but there was a young people in the saloon, immigrants and Darrell was; then Dodson came up to us and the witness asked Dodson if he would have a glass of beer; that then "everybody politicians was there 22 a week from the Election the Company;" the witness then walked out the door and crossed Jackson on the street; that he had not his knowledge of the time and time he did not tell his a young; that there was a large number of people in the front supporting Darrell after testimony that the witness then turned and went out and get the glass of beer; that Dodson [illegible] the witness in the saloon the Darrell in the saloon

Beckman said: "This is the man that started that argument there;" that the witness then said that he did not know that Beckman was working for the American Can Company, and that if he did, he would have saved him from harm. He stated that Beckman ran out of the saloon and that other people ran out after him and hit him. He further testified that he accidentally met Beckman about three weeks after the trouble and that he said to Beckman: "I would like to talk to you."; that Beckman said he would not talk with him and walked away; that the witness did not threaten to kill him with a gun or anything else.

The respondent Merrall testified that he was formerly an employee of the American Can Company at its Clybourn avenue plant; that he first saw Beckman on april 19, 1921, when he started to run out of the saloon; that the witness went with Kleinschmidt to the saloon and was standing near the bar, and suddenly someone said: "There is a scab at the American Can Company;" that the witness turned around and saw Beckman rush out of the door; that there was some trouble outside and he saw some man grab Beckman and start to pull him around; that then he and Kleinschmidt went back to drink their beer; that he did not assault Beckman or call him a scab. He further testified that he had been around the plant and that his duties were keeping "the men at work from being slugged" and that he always advised against violence.

Victor Howard testified on April 21, 1921, two days after the date in question, he was in the saloon on Clybourn avenue with the respondent Merrall; that he heard a conversation between Merrall and Beckman; that Beckman came over to where the witness and Merrall were standing and said: "I'm the fellow who got trimmed, assaulted, but I know it was not you who done -

Jackson said: "This is the man that started that argument
theory." Had the witness then said that he did not know that
Jackson was working for the American Gas Company, and that if
he did, he might have saved his from harm. He stated that
Jackson was one of the saloon and that other people was out
after him and his kin. He further insisted that he "endeavored
ely not lessons about their saloon with the friends and that
he said to Jackson: "I would like to talk to you." that
Jackson said he would not talk with him unfriended many; that
the witness did not intended to kill his with a gun or any-
thing else.

The respondent further testified that he was formerly
an employee of the American Gas Company at the Lighthouse avenue
point; that he first met Jackson on April 12, 1910, when he
started to run out of the saloon; that his clerks were with
friendliness to the saloon and a saloon meet him, and
suddenly someone said: "There is a man of the American Gas
Company." That the witness turned around and ran towards the
out of the door; that there was some trouble outside and he saw
some man grab Jackson and which to pull him around; then then
he and Fairchild were back in front there door; that he did
not actually testify at trial for a week. He further testified
that he had been around the place and then the police were
holding "the man at with from being shagged" and that he always
treated Italian visitors.

Walter Jones testified on April 12, 1910, the day
after the case in question, he was in the saloon of Lighthouse
avenue with the proprietors Jerrell; that he heard a conversation
between Jerrell and Jackson; that Jackson came over to study the
clerks and "Jerrell were talking and said: "I'm the fellow

Morrall, you boys are alright." This is substantially all the evidence in the record.

The chancellor having seen and heard the witnesses testify was in a much better position to determine what the facts were than we are in a court of review. Upon a careful consideration of all the testimony in the record it is plain that we would not be warranted in holding that the finding of the chancellor that the defendants had violated the injunction in the manner charged was against the manifest weight of the evidence.

(b) It is contended that it was error for the court to admit over respondents' objection testimony of a witness tending to show that the respondents had violated the injunction on April 7, and April 15 and other times prior to April 19, on which latter date it was specifically charged that the injunction had been violated - that the proof should be limited to the charge made in the petition, and that this was not done. It is true that the charge made against the respondents in the petition was that they violated the injunction of the court on April 19 by calling Beckman a "scab" and assaulting him, and the only question, therefore, was did the respondents call Beckman a "scab" and assault him on that date. No evidence could properly be admitted or considered unless it tended to prove or disprove that charge. Witnesses for the petitioner testified to facts which, if believed, would sustain the charge made in the petition. On the other hand, the charge made was specifically denied by the two respondents. The question, therefore, before the court was which witnesses were to be believed. In these circumstances any evidence that would tend to throw light on the controverted question as to the probability or improbability of the two versions of the matter was

Morris, yet there was not "clear" in retrospectivity all the evidence in the report.

The charge of being not based in evidence really was in a much wider position. It maintains that the facts were those we are in a court of review. Then a careful consideration of all the testimony in the record it is plain that we would not be warranted in holding that the finding of the commission that the defendants had violated the law prohibiting the manner charged was against the manifest weight of the evidence.

(b) It is contended that it was error for the court to admit over respondents' objection testimony of a witness tending to show that the respondents had violated the injunction in April 9, and April 22 and other times prior to April 29, on the ground that it was specifically charged that the injunction had been violated - that is, it tends to impeach or to change her in the petition, and that was not done. It is true that the trial court in respondents in the petition was that they violated the injunction of the court on April 29 by selling beverages a "beer" and mentioning him, and the only question, therefore, was did the respondents sell beverages a "beer" and mention him on that date. The evidence could properly be admitted as corroborative evidence if denied in order to discover that charge. Testimony for the petitioner petition is true which, if believed, would support the charge made in the petition. On the other hand, the charge was specifically denied by the two respondents. The question, therefore, before the court was which witnesses were to be believed. It does otherwise appear evidence that would tend to place light on the controverted question as to the probable

proper. The law is that whenever there is a conflict in the evidence relevant to the issue, evidence of collateral facts which have a direct tendency to show that the evidence of the one side is more reasonable and, therefore, more credible than the other is admissible. Standard Brewery v. Healy, 209 Ill. App. 272, and cases there cited. Under this rule we think the evidence objected to would be material and of assistance to the chancellor in determining the ultimate question before him, and in these circumstances it was properly admitted.

The order or decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

335 - 27293

AMERICAN CAN COMPANY, a corp., v. INTERNATIONAL ASSOCIATION OF MACHINISTS, et al, On appeal of HARRY MORRALL, Appellant, v. PEOPLE OF THE STATE OF ILLINOIS, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal Harry Morrall seeks to reverse an order or decree of the Superior Court of Cook County finding him guilty of violating an injunction issued in a labor controversy and committing him to the County Jail of Cook County for a period of sixty days.

From what we have said and for the reasons given in the case of American Can Company v. International Association Of Machinists, on appeal of Axel Kleinschmidt, General No. 27292, the order or decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

365 - 27323

NEWTON WILLIAMS,
Appellee,

v.

CHARLES B. TRAVIS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $750.00, claiming that the defendant had represented plaintiff in the purchase of certain real estate in Chicago, and for which plaintiff paid defendant $250.00, and on account of the fraud and deceit of the defendant paid $500.00 more for the property than the owner was asking for it. There was a trial before a judge and jury and a verdict and judgment in plaintiff's favor for the amount of his claim, to reverse which defendant prosecutes this appeal.

Plaintiff's theory of the case, and his evidence in support of it, was that he was desirous of purchasing the property known as 4158 Calumet avenue, Chicago, and for this purpose negotiated with defendant, who was a real estate broker; that he requested defendant to ascertain who the owner was and told him that if he could purchase the property on satisfactory terms he would pay defendant $250.00, which the defendant agreed to; that afterwards defendant informed plaintiff who the owner was and told plaintiff that the owner was asking $11,000.00 but that he had agreed to take $10,000.00, which latter amount plaintiff agreed to pay; that afterwards defendant drew up a

contract which was executed by plaintiff and the owner of the property, one Chiha, the purchase price being $10,000.00. To evidence the indebtedness of $250.00 which plaintiff had agreed to pay defendant he executed his promissory note for that amount and later paid it. The $250.00 was paid after the deal was consummated. About six months afterwards plaintiff saw Chiha, from whom he purchased the property, and upon inquiry Chiha told plaintiff that he only asked $9500.00 for it from the defendant and that he was willing to sell it at that price, but that defendant told him to put the selling price at $10,000.00 and give $500.00 to defendant, to which proposal Chiha agreed; that after the deal was consummated Chiha paid the defendant the $500.00. The evidence further tends to show that this was the first knowledge that plaintiff had that Chiha's price was $9500.00.

On behalf of the defendant the evidence tended to show that plaintiff called on defendant and stated that he would pay $10,000.00 for the property and requested defendant to find out who was the owner, and that if defendant would do this and the deal was consummated, plaintiff would pay defendant $250.00; that afterwards the defendant made inquiry and ascertained that Chiha was the owner of the property and had a conversation with him; that Chiha said he would sell for $10,000.00 and defendant stated that he had a purchaser who would pay that amount for it; that Chiha told defendant at that time that if the deal was consummated at that price he would give defendant $500.00; that afterwards defendant prepared a contract, which was executed, the deal was consummated, and he was paid $500.00 by Chiha and $250.00 by the plaintiff. Defendant denied that Chiha told him he would sell the property for $9500.00.

Both parties introduced evidence tending to corroborate their respective versions of the controversy. The issue was sub-

contract which was guaranteed by plaintiff and the owner of the property, one Dibble, the purchase price being $18,000.00. To evidence the indebtedness of $18,000.00 which plaintiff was agreed to pay defendant he executed his promissory note for that amount and issued unto it. The $18,000.00 was paid after the deal was consummated. Shortly six months plaintiff and Dibble, they then also be partners in property, and they thereby their mid disagreement that then be only owned $9000.00 for it from the defendant and that he was willing to sell it at that price, but that defendant told him to put the selling price at $18,000.00 and give $9000.00 to defendant, to which proposal Dibble agreed; that after the deal was consummated Dibble paid the defendant the $9000.00. The evidence further tends to show that the first knowledge that plaintiff had that Dibble's price was $18000.00.

On trial of the defendant for criminal fraud in the that plaintiff called on defendant and stated that he would pay $18,000.00 for the property and requested defendant to find out who was the owner, and that if defendant could do this and the consummated, plaintiff would pay defendant $900.00. That afterwards the defendant said inform all witnesses that Dibble was the owner of the property and had a conversation with him; that Dibble said he would sell for $18,000.00 and defendant stated that he had a purchaser who would pay that amount for it; that Dibble told defendant at that time that if the deal was consummated at that price he would give defendant $900.00; that afterwards defendant informed a witness. After the deal was consummated, and he was paid $900.00 by Dibble and $900.00 by the plaintiff. Defendant denies that Dibble had he never sold the property for $18000.00.

Defendant introduced witnesses tending to substantiate

mitted to the jury and their verdict indicates that they believed the testimony offered on behalf of plaintiff and disbelieved that adduced by defendant. We have carefully considered the evidence in the record and are of the opinion that it was sufficient to warrant the finding of the jury in favor of plaintiff. It is certain that we would not be justified in holding that the verdict was against the manifest weight of the evidence. In these circumstances the verdict must stand.

Numerous points are urged by the defendant why the judgment should be reversed. It is contended that the statement of claim fails to state a cause of action. We think the contention is untenable. The statement set up in substance that plaintiff employed defendant as a real estate broker in the purchase of the property for which plaintiff agreed to pay defendant $250.00; that defendant was advised by the owner of the property that it could be purchased for $9500.00, but the defendant in fraud of his duty to plaintiff advised plaintiff that it would require $10,000.00 to purchase the property; that thereupon the plaintiff acting on this representation bought it for $10,000.00, when as a matter of fact it could have been bought for $9500.00, and that defendant was paid $500.00 by the owner. We think this stated a cause of action.

Nor is there any merit in defendant's contention that the court should have stricken the cause from the short cause calendar on the ground that no affidavit was filed as required by statute. The affidavit has been supplied in this court by a supplemental record. The motion to strike was not made until the case was reached for trial although it had been placed on the short cause calendar a considerable period of time before that. The motion was made too late, and there is no merit to the point.

matter to the jury and since verdicts indicate that they believed the testimony offered on behalf of plaintiff and disbelieved that adduced by defendant. In such cases particularly consideration evidence in the record and so on at the minimum that it was sufficient to warrant the finding of the jury in favor of plaintiff. It is certain that we would be justified in holding that the verdict and against the contrary weight of the evidence, not in these circumstances the verdict must stand.

Numerous points are raised by the appellant why the judgment should be reversed. It is contended that the statement of claim fails to state a cause of action. We think the contention is unsound. The statement set up an substance that PLAINTIFF employed defendant as a fuel oil house broker in the purchase of the property for which plaintiff agreed to pay defendant $2000.00; that defendant was advised by the owner of the property that it would be purchased for $2000.00, but the defendant in fraud of his duty to plaintiff advised plaintiff that it would require $10,000.00 to purchase the property; that defendant the plaintiff acting on this representation bought it for $10,000.00, when as a matter of fact it would have been bought for $2000.00, and that defendant was paid $800.00 by the owner. We think this states a cause of action.

The is also the matter in defendant's contention that the court should have allowed the issue from the jury based upon evidence on the ground that no affidavit was filed as required by statute. The affidavit was been supplied in this court by a supplementary record. The motion to strike was not made until the case was reached for trial although it had been placed on the docket some considerable period of time before that. The motion was made too late, and there is no merit in

It is also contended that the court erred in overruling defendant's objections to questions put to defendant who was called by plaintiff under section 33 of the Municipal Court Act. It is argued that the only questions that could properly be asked of a witness under this section were such questions as called for facts exclusively within the knowledge of the defendant. It is obvious that this is not the law. The statute is not so limited. Defendant also complains that it was error to call the defendant as a witness under section 33 when he has not been subpoenaed and paid the customary witness fee. Of course, this contention is obviously unsound. Complaint is also made that the court erroneously refused to permit a witness to testify for the reason that the witness had violated the order of court excluding the witnesses from the court room. It does not appear in the record in any manner what facts were sought to be proved by the testimony of this witness, and even if there was error, which it is not necessary for us to decide, we would not be warranted in disturbing the judgment, because the testimony of this witness might have been of little or no value.

Further complaint is made to the admission, over defendant's objection, of plaintiff's testimony of a conversation he had with Chiha, the former owner, six months after the deal was closed, at which conversation Chiha told plaintiff that he was willing to sell the property for $8500.00, and had so informed the defendant when he was first approached. The evidence of this conversation was adduced on the re-direct examination of the plaintiff. On his cross-examination of plaintiff counsel for defendant interrogated him as to when he talked with Chiha concerning the selling price of the property, and the witness testified that he never talked with him before the consummation of the deal; that the first time he discussed the price with him

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It is quite conceded that the court erred in overruling defendant's exceptions to questions put in different ways and relating to plaintiff under section 32 of the Judiciary Act 1903. It is argued that the only questions that could properly be asked of a witness under this section were such questions as related to facts ancillary with the knowledge of the witness and. It is obvious that this is not the law. The statute is not so limited. Defendant also complains that it was error to call the defendant as a witness under section 32 when he had been subpoenaed on behalf of the plaintiff. Counsel for the defendant in a strenuous argument insisted that, if this section is constitutionally valid, it should be so limited that the person that has claimed but violated the secrecy of court restraining the witnesses from the [illegible] room. It does not appear in the record to any material extent what facts were sought to be proved by the testimony of this witness, and even if there was error, which it is not necessary for us to decide, we would not be warranted in disturbing the judgment, because the testimony of this witness might have been of little or no value.

Further complaint is made to the admission, over defendant's objection, of plaintiff's testimony of a conversation he had with Chin, the former owner, six months after the deal was closed, in which conversation Chin said [illegible] that he was willing to sell the property for $8000.00, and had no idea that the defendant was the first purchaser. The evidence of this conversation was received on the credibility examination of the witness. It is the contention of plaintiff because the defendant interrogated him as to when he talked with Chin concerning the selling price of the property, and the witness testified that he never talked with him before the commencement of the deal; that the first time he discussed the matter [illegible]

was after the deal had been closed. On re-direct counsel for the plaintiff, over objection, was permitted to go into the details of the conversation. The objections were merely general and no reason was assigned why the evidence was not competent. Chiha was afterwards called and he testified to substantially the same conversation that he had with plaintiff after the deal had been consummated. It was objected that this was out of the presence of the defendant and was, therefore, improper. Considering the manner in which this evidence got into the record and the further fact that it was material for the plaintiff to show that he could have purchased the property for less than $10,000.00, we think the ruling of the court was not erroneous.

Counsel for defendant argues that the evidence shows that defendant acted in the transaction merely as a "middleman" and that he was employed by plaintiff to find out who the owner of the property was and that he had completed his services when he did this, and therefore, he was entitled under the law to collect commissions from both sides. The evidence on behalf of the plaintiff, however, was that he did more than bring plaintiff and Chiha together; that he went further and by his fraudulent conduct plaintiff was required to pay $500.00 more for the property than it could have been purchased for. In these circumstances plaintiff was entitled to recover the $500.00 and the commission he paid the defendant. It is well settled that if a broker or agent is employed in a particular transaction and is guilty of bad faith toward his principal, he thereby forfeits his commission. Kafner v. Herron, 165 Ill. 242. We have considered the objections made to the instructions given and refused and are of the opinion that defendant was not prejudiced by the rul-

ings of the court on them.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

375 - 27331

EDWARD H. HARRISON,

Appellee,

v.

ROSEHILL CEMETERY COMPANY,
a corp.,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, a certified public accountant, brought suit against the defendant to recover $1833.45 which he claimed was due him for services rendered. The declaration consisted of the common counts to which was attached an affidavit of plaintiff's claim. On motion plaintiff was required to file a bill of particulars. The defendant filed a plea of the general issue and an affidavit of merits. This affidavit was held insufficient, the plea was stricken, and a judgment entered in favor of the plaintiff for $1418.05. An appeal was taken to this court where the judgment was affirmed, this court holding that the affidavit of merits was insufficient. The case was taken by certiorari to the Supreme Court where the judgment of this court was reversed and the cause remanded. Harrison v. Rosehill Cemetery Co., 291 Ill. 416. After the case was redocketed in accordance with the mandate of the Supreme Court, it was tried before a judge and a jury and there was a verdict and judgment for $1418.05 in plaintiff's favor, to reverse which this appeal is prosecuted.

The defendant in his affidavit of merits, among other things, set up that the services performed by plaintiff were not rendered for the defendant but were rendered for other parties and against the interests of the defendant and in fraud of its interests. Plaintiff in his bill of particulars set up in detail the services for which he was claiming payment, giving the dates and nature of the work and the number of hours devoted to it. The bill consisted of four items; the first, after setting forth the details above mentioned, continued: "8 days and 4 hours @ $50.00 - $278.50." The second item also set out in detail the number of hours, the nature of the work, and concluded: "Harrison, 3.79 days @ $50.00 - $189.50; O'Malley, 2.43 days @ $25.00, $60.75", a total of $250.25. The third item was set up in like manner and aggregated $1239.30. The fourth was for certain specified services at the same per diem aggregating $250.00. This item was eliminated from the case, so that there was left remaining in the bill of particulars on which the case went to the jury the three items, viz: $278.50, $250.25, and $1239.30, or a total of $1768.05. On this amount there were three credits given, two of $100.00 each and one of $150.00, leaving a balance claimed of $1418.05, for which amount the jury rendered their verdict.

Plaintiff's evidence tended to show that he was employed by proper officials of the defendant to perform the work of an accountant in examining the books and assets of defendant. The evidence further tends to show that a suit was brought by some of the minority stockholders to have a receiver for defendant appointed on the ground that the officers of the company were fraudulently making away with its assets.

Part of the services rendered by the defendant were in connection with the defense of this suit in consulting with lawyers who then represented the Rosehill Cemetery Company and its

The defendant in the affidavit of merits, among other things, set up that the services performed by plaintiff were not rendered for the defendant but were rendered for other persons and against the interests of the defendant and in fraud of his interests. Plaintiff in his bill of exceptions set up in detail the services for which he was claiming payment, giving the dates and nature of the work and the number of hours devoted to it. The bill consists of four items; the first, after setting forth the details above mentioned, continued: "8 days one 4 hours @ $30.00 - $173.30." The second item also set out in detail the number of hours, the nature of the work, and concluded: "Services, 3.75 days @ $30.00 - $135.00; Mileage, 4.44 days @ $25.00, $60.75", a total of $220.25. The third item was set up in like manner and aggregated $128.25. The fourth was for certain specified services at the rate per diem aggregating $280.75. This item was eliminated from the case, by this jury was left considering the bill of particulars on which the case went to the jury the three items, viz: $173.30, $220.25, and $128.25, or a total of $521.80. On this amount the jury made certain cuts, the of $100.00 and one of $200.00, leaving a balance claimed of $219.55, for which amount the jury rendered their verdict.

Plaintiff's evidence tended to show that he was employed by proper officials of the defendant to perform the work of an accountant in examining the books and assets of defendant. The evidence further tends to show that a bill was introduced by one of the minority stockholders to have a receiver for defendant, alleging on the ground that the officers of the company were fraudulently working away with the assets.

Part of the services rendered by the attorneys were in connection with the defense of this suit in connection with the [illegible] [illegible] [illegible] [illegible] [illegible]

officials. The evidence also tends to show that for about two years prior to the time he rendered the services in question plaintiff had done some work for the defendant and had been paid at the same rate per day for those services. Plaintiff also testified in this connection that he had been employed by the officers of the defendant company; that they agreed to pay him $50.00 per day for his services and $25.00 per day for his assistant.

The defendant contends that the court erred in admitting evidence on behalf of the plaintiff to the effect that plaintiff had a specific contract for so much per day for the services to be rendered because the bill of particulars filed by plaintiff, and which limited plaintiff's proof to its allegations, was based on an implied contract and, therefore, it was incumbent on plaintiff to prove an implied contract and the reasonable value of his services. In support of this counsel for the defendant points out that in the opinion rendered by the Supreme Court in the former appeal of this case (291 Ill. 416), it was expressly stated that "the declaration as limited by the bill of particulars was not upon an implied contract for services rendered by the plaintiff to the defendant * * * It was incumbent upon the plaintiff to prove that the services were rendered under such circumstances as would raise an implied promise of the defendant to pay for them." And counsel in his argument in the case at bar says that he was taken by surprise when the proof adduced on behalf of plaintiff tended to show an express agreement and not an implied one. If the defendant was surprised on the trial when this evidence was introduced, he did not so advise the trial court. If he was taken by surprise, as he says, on the ground that he was not prepared to meet plaintiff's evidence tending to

affidavit. The affidavit also tends to show that for some two years prior to his time he remembers the services he ren- dered plaintiff had done more work for the defendant and had been paid at the same rate per day for these services. Plain- tiff also testified in this connection that he had been em- ployed by the officers of the defendant company; that they agreed to pay him $50.00 per day for his services and $25.00 per day for his assistant.

The defendant contends that the court erred in mi- nitting evidence on behalf of the plaintiff to the effect that plaintiff had a specific contract for an wage per day for the services to be rendered because the bill of particulars filed by plaintiff, and which limited plaintiff's proof to its al- legations, was based on an implied contract and, therefore, it was incumbent on plaintiff to prove an implied contract and the reasonable value of his services. In support of this contend for the defendant relies on, inter alia the opinion ren- dered by the Supreme Court in the former appeal of this case (267 Ill. 494). It was correctly stated that the pertinent ex tract by the bill of particulars was based on implied contract for services rendered by the plaintiff to the defend- ant * * * It was incumbent upon the plaintiff to prove that the services were rendered under such circumstances as would raise an implied promise of the defendant to pay for them." and counsel in his argument in the case at bar says that he was taken by surprise when the proof offered on behalf of plain- tiff tended to show an express agreement and not an implied one. If the defendant was surprised on the trial when this evidence was introduced, he did not so notify the trial court. If he was taken by surprise, as he says, on the ground that he was not prepared to meet plaintiff's evidence tending to

show that there was an express agreement, he could have so advised the court and a juror might have been withdrawn and the case continued. But no suggestion appears in the record that would indicate surprise on the part of the defendant. When the case was before the Supreme Court the only question for consideration was whether defendant's affidavit of merits was sufficient to meet the requirements of the statute. There was no point there made that plaintiff's bill of particulars was based on an implied or express contract. It is perfectly plaint to us that where plaintiff in his bill of particulars sets up in detail the nature of the work performed and the number of hours he was engaged in doing it totaling so many days and so many hours at so much per diem, he might introduce evidence to substantiate this claim either on the theory that there was an implied agreement to pay him $50.00 per day, that being the reasonable value of his services, or he might introduce evidence tending to show that there was an express agreement to pay him that amount. In other words, the bill of particulars before us is so framed as to admit of evidence that would tend to show either an express or an implied contract. If it was not sufficient, defendant could have moved for a more specific bill of particulars. We are also of the opinion that the point has not been properly saved for review. When plaintiff was testifying to the effect that an express per diem was agreed upon for his services with the defendant, counsel for the defendant objected, saying: "Your Honor, there is nothing in the bill of particulars under which this kind of evidence is admissible, and I object to it and move to strike it out." The motion was overruled. It was not pointed out that there was a variance between the bill of particulars and the proof offered. It has been repeatedly held that a variance must be specifically pointed out.

show that there was no express agreement, he could have an advanced the money and a jury might have been satisfied and the case decided. But no conceivable process in the record that would indicate agreement on the part of the defendant. He has made his entire contention that the evidence establishes that the plaintiff's attorney of service was modified to meet the requirements of the rights. There was no jury trial made and plaintiff's bill of particulars was based on an implied or express contract. It is perfectly plain to me that there plaintiff in his bill of particulars made up in detail the nature of the work performed and the number of hours he was engaged in doing it totaling so many days and so many hours at so much per diem. He might introduce evidence to substantiate this claim of his on the theory that there was an implied agreement to pay him $20.00 per day, that being the reasonable value of his services, or he might introduce evidence tending to show that there was an express agreement to pay him that amount. In other words, the bill of particulars before us is an immaterial as to kind of evidence that would tend to show either an express or an implied contract. If it was not sufficient, defendant could have moved for a more specific bill of particulars. We are also of the opinion that the point has not been properly saved for review. When plaintiff was testifying to the effect that an express per diem was agreed upon for his services with the defendant, counsel for the defendant objected, saying: "Mr. Judge, there is nothing in the bill of particulars about this item of evidence is admissible, and I object to it and move to strike it out." The motion was overruled. It was not pointed out that there was a variance between the bill of particulars and the proof offered. It has been repeatedly held that a variance must be

Again at the close of plaintiff's evidence counsel for the defendant said: "Here is another point that I want to draw the attention of the court to, that there is no evidence here as to the value of the services. The declaration is limited by the bill of particulars. That is referred to by the Supreme Court in its opinion holding that plaintiff can recover anything that he can prove his services to the Rosehill Cemetery Company were worth. Our defense is here, and it was there, those services were not rendered to the Rosehill Cemetery Company but to the defendants." And at the close of the evidence the defendant requested the court to instruct the jury to "disregard any evidence tending to show a special contract or contracts fixing the price per diem for the services sued for in this case." Either of these pointed out that the bill of particulars was based on an implied contract, while the evidence showed that there was an express contract. The question of variance cannot be saved in this manner. The point must be specifically brought to the attention of the court. "The trend of the law is to discourage technicalities which tend to defeat natural justice and right and to encourage the adjudication of cases on their merits." City of Chicago v. Wieland, 139 Ill. App. 197. This language was used in discussing the question of an alleged variance. Moreover, the evidence as to some of the items is sufficient to warrant the verdict of the jury on the theory of an implied contract. The evidence is to the effect that plaintiff had, prior to the time in question, rendered similar services for the defendant for which he was uniformly paid the same rate. Even if the evidence showed nothing further, this would be sufficient to warrant a finding that it was the understanding, when plaintiff was employed to render the services in the instant case, that he would be paid the same rate as formerly.

Again at the close of plaintiff's evidence counsel for the defendant moved: "Have in mind, gentlemen, that I have to show the plaintiffs of the court is, that there is no evidence sufficient to the value of the services. The plaintiffs is limited by the fill of particulars. That is referred to by the Supreme Court in the opinion holding that plaintiff and respondent supplying that he can prove his services in the reasonable length of time more weeks. The defendant is here, and it was there, these questions were not raised in the municipal Court. Any tribunal has to use information." One of the items of the complaint the defendant requested the court to instruct the jury to "disregard any evidence tending to show a reasonable worth of services in finding the price and give for the services made for in this case." Neither of these points are that the fill of particulars has been in no doubt material, while the evidence tends to show was of material material. The question of evidence cannot be raised in this manner. The point must be specifically raised in the discretion of the court. "The trend of the law is to eliminate technicalities which even in defend minor jurisdiction and to substitute the adjudications of merit in court cases." Lyle et Lyle v. Bigham, 199 Ill. App. 197. This language was used in discussing the question of an alleged variance. However, the evidence as to some of the items is sufficient to support the verdict of the jury on the theory of an implied contract. The evidence is to the effect that plaintiff was, prior to the time in question, employed similar services for the defendant for which he was entitled to receive the same price. Then if the relations existed which the jury, then would be sufficient to warrant a finding that it was the understanding, that plaintiff was entitled to receive the services in the instant case, that he would be paid the same

It is also claimed that the evidence shows that the officers or managers of the Rosehill Cemetery Company in charge of its affairs at the time plaintiff was employed were defrauding the company and that this fact was known to the plaintiff, and that his services were rendered in furtherance of their fraudulent schemes and transactions, and, therefore, he ought not be entitled to recover for them from the cemetery company. We think the evidence shows that plaintiff's services were rendered in entire good faith and that he could not be charged with any fraud.

The defendant further argues that the court erred in refusing to instruct the jury, as requested by it, that plaintiff was not entitled to recover any interest on the amount of his claim. On the other hand plaintiff contends that he was entitled to interest and considerable argument is indulged in by both sides and authorities are cited to sustain each contention. Since plaintiff is asking that the judgment be affirmed he cannot complain because the jury did not allow any interest, and since no interest was included in the verdict, the defendant cannot complain. While the verdict was a general verdict it clearly appears that the three items mentioned in the bill of particulars were all that the jury allowed. The argument of counsel for both sides concerns a moot question only. Upon a consideration of the entire record we are clearly of the opinion that the evidence warranted the verdict and the judgment rendered thereon.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

It is also claimed that the evidence shows that the

officers or members of the Jewish Institute Company in

charge of its affairs at the time originally was assigned were

defrauding the company and that this fact was known to the plain-

tiff, and that the writing sub-rogating its furnishers of lower

Transmissions schemes and guarantees, and, therefore, he might

not be entitled to recover for them from the insolvent company.

We think the evidence shows that plaintiff's services were ren-

dered in entire good faith and that he could not be charged with

any fraud.

The defendant further argues that the court erred in

returning to instruct the jury, on request by it, that plaintiff

CITY was not entitled to recover any interest on the amount of

his claim. On the other hand plaintiff contends that he was

entitled to interest and consequently argument is implied in

by implication the contention that plaintiff is entitled to

interest. There plaintiff is entitled that the judgment be affirmed in

accord complaints because the jury did not allow any interest, and

where no interest was included in the verdict, the defendant

cannot complain. This the verdict was a general verdict it

thereby appears that the three items mentioned in the bill of

particulars were all that the jury allowed. The amount of

interest for his claim therefore a mere matter only. Thus a

consideration of the entire record we are already of the opinion

that the evidence warranted the verdict and the judgment rendered

thereon.

The judgment of the Circuit Court of Cook County is

affirmed.

AFFIRMED.

Messrs. F.A. and Albert, J. Messrs.

364 - 17342.

CHARLES STRUMIL,
Appellant,

v.

ROMAN ANDRUSKIEWICZ,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal plaintiff seeks to reverse an order or decree of the Circuit Court of Cook County by which a writ of ne exeat republica theretofore issued was quashed and the defendant discharged.

The record discloses that on April 8, 1931, complainant filed his bill for a writ of ne exeat republica in which it was alleged that the defendant was indebted to complainant on a promissory note for $700.00 dated April 13, 1918; that afterwards on March 26, 1931, complainant had recovered a judgment in the Municipal Court of Chicago against defendant on said note for $918.00; that on March 31, 1931, complainant brought garnishment proceedings against the Kimbark State Bank, Chicago, as garnishee; that in that proceeding the bank filed an answer denying that it owed the defendant any money on April 6, 1931. The bill further alleged that complainant had repeatedly requested and demanded from the defendant payment of the judgment, but that payment was refused; that defendant had sold a piece of property for a considerable sum of money which he deposited in the Kimbark State Bank, but had withdrawn the same on March 6, 1931; that since plaintiff had brought the suit, against the defendant in the Municipal

Court defendant threatened complainant with bodily violence. It was also alleged that defendant had threatened to leave the United States and return to Lithuania and that he had purchased a steamship ticket and was about to depart and remove all of his property from the State and, therefore, complainant would be left without any security for his judgment. The writ issued and defendant was placed under arrest. He was later released on bond. Defendant filed an answer in which he denied that he was indebted to complainant in any sum. He admitted that the judgment had been entered against him by confession in the Municipal Court without notice to him; and alleged that as soon as he learned of the judgment he employed counsel and upon motion the judgment of the Municipal Court was vacated and he was given leave to defend. The answer further set up that he did not owe the $700.00 on the promissory note for which judgment was confessed; that he could not write the English language; that he had borrowed only $20.00 from complainant at which time he signed a paper; that he afterwards paid the $70.00 and complainant said he would destroy the note.

Afterwards, by leave of court, defendant filed a supplemental answer setting up that after his first answer was filed the case had been tried in the Municipal Court and a verdict and judgment had been returned in his favor, and that the matter had been appealed to the Appellate Court by complainant. He further set up by affidavit that when he was arrested on the writ of ne exeat he gave bond, and to obtain a surety he was required by the surety to deposit $1100.00, which sum the surety still held. Defendant further denied that he

had withdrawn money from the Kimbark State Bank for the purpose of avoiding payment of any just claim against him, or that he had ever threatened complainant with bodily violence. He also denied that he had threatened to leave the country.

Upon the filing of the amended and supplemental answer and the affidavit in support thereof, the defendant moved that he be discharged. The order of the court recites that the matter came on for hearing upon the amended and supplemental answer and the affidavit in support thereof and upon oral and documentary evidence, and thereupon it was adjudged and decreed that the writ be quashed and the defendant discharged. Two days later, on July 23, complainant moved that his bill be dismissed and prayed an appeal from the order of July 21. An order was accordingly entered.

Defendant contends that the appeal is from the order quashing the writ entered on July 21, 1921, which is an interlocutory order, and, therefore, it does not lie. And further that the decree dismissing the bill was entered on complainant's motion, and that he is not, therefore, permitted to appeal from an order dismissing the bill. Neither of these contentions is sound. After the court quashed the writ and discharged the defendant it is not suggested what remained in the case for the court to pass upon. The order was, in substance, a disposition of the entire case and the court should have then dismissed the bill, and the complainant was warranted in having this inadvertence corrected two days later by having the bill dismissed. We think the matter is properly before us.

Complainant contends that the court erred in quashing the writ and discharging the defendant. We think this position

had distances nearly from the Kimberly Point Base for the purpose of providing payment of any just claim against him, so that he had very diversified employment with hardly sufficient. He also stated that it had interfered in light the activity.

Upon the filing of the amended and supplemental answer and the affidavit in support thereof, the plaintiff moved that he be discharged. The order of the court finding that the matter came in for hearing upon the amended and supplemental answer and the affidavit in support thereof, and upon oral and documentary evidence, and therefore it was adjudged and decreed that the writ be quashed and the defendant discharged. Two days later, on July 24, respondent moved that his bail be discharged and prayed an appeal from the order of July 21. He other the aforesaid petition.

Petitioner contends that, the appeal is from the order quashing the writ entered on July 21, 1921, which is an interlocutory order, and, therefore, is does not lie. And further that the order discharging the bail was entered on supplemental motion, and that is is not, therefore, permitted to appeal from an order discharging the bail. Matters of law contained in that. Since the court decided in his favor discharge the recognizance it is not competent with remedies in the case for the court to pass upon. The issue and, in substance, a determination of the rights upon the order should have been decided the bail, and the contention was therefore in error this interlocutory order or the bail by leaving the bail discharged. To think the matter is primarily before us.

Respondent contends that the court erred in quashing the writ and discharging the defendant. We think the position

cannot be sustained. At the time the order was entered it was made to appear to the chancellor that the judgment rendered in the Municipal Court against the defendant, and upon which the bill was predicated, had been set aside and the case tried in that court on its merits and decided in favor of the defendant. We think it is obvious that if these facts were made to appear to the chancellor when the writ was originally issued, complainant's motion for a writ would have been denied. We are clearly of the opinion that the chancellor was warranted in entering the order quashing the writ and discharging the defendant.

Moreover, we have this day handed down an opinion affirming the judgment of the Municipal Court which was rendered by that court in the suit on the note and which is the basis for the instant case. (Strumil v. Andrusklewicz, Gen. No. 37142.)

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

385 - 27343

CHARLES STRUMIL,

Appellant,

v.

ROMAN ANDRUSKIEWICZ,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

231 I.A. 625

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On March 26, 1921, plaintiff obtained a judgment by confession against defendant in the Municipal Court of Chicago for $918.00 on a promissory note. Afterwards on motion of the defendant the judgment was set aside and he was given leave to defend. The case came on for trial before a judge and jury and there was a verdict and judgment in defendant's favor, to reverse which plaintiff prosecutes this appeal.

From the evidence it appears that the note on which the judgment was based was dated April 13, 1915, for $700.00, due on demand with interest at the rate of 6%, per annum made by defendant and payable to plaintiff's order. The note bore an endorsement dated October 26, 1919, of a cash payment of $100.00, and showing a balance due as endorsed on the note, of $600.00. On April 16, 1921, the defendant moved to vacate the judgment and for leave to defend. This motion was supported by his affidavit. The motion was allowed and it was ordered that the affidavit stand as defendant's affidavit of merits to plaintiff's claim. It was further ordered that the original note be impounded with the clerk.

Plaintiff's statement of claim was the usual form in such cases. The defense set up in the affidavit was that the defendant had not at any time received $700.00 in cash or in any other thing of value from the plaintiff; that the defendant had never been indebted to the plaintiff in any sum except $20.00, which he borrowed from the plaintiff in 1915; that at that time plaintiff required defendant to sign a paper which plaintiff told defendant was a promissory note for $20.00; that about three weeks after that date plaintiff paid the $20.00 and asked for the note; that plaintiff stated that it would be all right and that he would destroy the note as he did not have it at that time, and that defendant had heard nothing more of the matter until he was notified that a judgment had been confessed against him. The affidavit further set up that defendant had not paid $100.00 on the note as appeared by the endorsement, but averred that after July 1, 1919, when the prohibition law became effective, plaintiff left a barrel of whisky in defendant's backyard, out of which defendant used about three or four gallons. Plaintiff demanded $300.00 for the barrel of whisky, which defendant refused to pay, and thereupon the barrel of whisky was removed by plaintiff; that afterwards by reason of threats of plaintiff that he would sue the defendant the latter paid plaintiff $100.00 on account of the whisky he had used. The affidavit further denied that defendant had knowingly signed a promissory note for $700.00, as alleged in the statement of claim, but if there was such a note, it was procured by fraudulent statements of plaintiff that the note which defendant signed was for $20.00.

Defendant in his brief states that prior to the time he filed his brief in this court he made a motion to strike

Plaintiff's guarantee of claim was the usual form in such cases. The defense set up in the affidavit was that the defendant had not at any time received $[illegible] in cash or in any other thing of value from the plaintiff; that the defendant has never been indebted to the plaintiff in any sum except $[illegible], which he received from the plaintiff in 1928; that at that time plaintiff required defendant to sign a paper which plaintiff said evidenced the [illegible] for $[illegible]; that about three weeks after that the plaintiff paid the $[illegible] and asked for the note; that plaintiff stated that it would be all right and that he would destroy the note as he did not owe it at that time, and that defendant has heard nothing more of the matter until he was notified that a judgment had been entered against him. The affidavit further set up that defendant had not paid $[illegible] on the note as alleged by the plaintiff, and averred that after July 1, 1929, when the prohibition law became effective, plaintiff left a period of [illegible] in defendant's business, during which defendant made short trips of [illegible] [illegible] $[illegible] to the amount of [illegible], which defendant returned to him, and throughout the period of [illegible] and [illegible] of plaintiff. That defendant's [illegible] of plaintiff that the note which defendant signed was for $[illegible], as stated in the affidavit, but at that time was also a note, in the possession of defendant, evidencing of plaintiff that the note which defendant signed was for $[illegible].

Defendant in his brief charges that prior to the time

the bill of exceptions, which motion this court denied, and that he now renews the motion. A great deal of argument is indulged in and authorities are cited and discussed why the motion should have been sustained and the bill of exceptions stricken. This practice will not be permitted. The motion to strike having been denied, the matter has long since been disposed of and will not be again considered.

The evidence tends to show that in 1915 plaintiff was in the saloon business at 158 East 107th Street, Chicago, and that defendant lived in the neighborhood and was one of his customers; that the parties had known each other for some time. Plaintiff testified that on April 13, 1915, the defendant came to plaintiff's saloon and borrowed $700.00 from him; that to evidence this indebtedness plaintiff filled out a blank note which the defendant signed and delivered to plaintiff. He further testified that at that time his brother Julius, who was tending bar for him, and Peter Skibutnas were present; that it was about eight o'clock in the evening; that he asked his brother Julius to get the "junk box" in which he kept the cash; that the box was brought to plaintiff and that he counted out the money, $500.00 in twenties, $100.00 in tens, and $50.00 in fives"; that afterwards, October 24, 1919, the defendant paid $100.00 and that plaintiff endorsed this payment on the note. On cross-examination he testified that the defendant lived in the neighborhood and had been coming to plaintiff's saloon for many years, several times per week up until 1919. He further testified that he did not put a barrel of whisky in defendant's backyard or basement and that the defendant never got a barrel of whisky from him; that plaintiff never tried to collect $100.00 for the whisky from the defendant. In explaining some apparent discoloration or marks of altera-

tion on the note plaintiff stated that some wine had been spilled on the note; that plaintiff put the note in the safe after it was signed and later caught his sleeve on the top shelf of the safe and spilled some wine which ran down the safe and some of which got on the note; that he wiped it off with a towel. He further testified that defendant never borrowed $20.00 from him; that the day before defendant borrowed the money he stated he wanted to make a payment on his property and promised to repay the money within two or three weeks; that defendant never paid plaintiff $20.00.

The defendant was then called in his own behalf and testified through an interpreter that he was a laborer working for a railroad company; that he was a Lithuanian by birth and had lived in this country sixteen years; that he had known plaintiff for a long time and frequented his saloon; that about 1915 he borrowed $20.00 from him and repaid it in two or three weeks; that at the time he borrowed the money he signed a paper. He then identified his signature on the note but said that he could not read English. He further testified that when he paid plaintiff the $20.00 he asked for the note and that plaintiff said he had not time to give it to him then but that plaintiff would "break him up." Defendant further testified that he paid plaintiff $100.00 for whisky in 1919, which he had used out of a barrel which had been left in his back yard and later rolled into his basement, and for which barrel plaintiff demanded $300.00; that the defendant refused to make this payment and later Julius Strumil took the whisky remaining in the barrel away; that defendant had used but about four gallons of the whisky. He further testified that he never borrowed $700.00 from plaintiff, but that he did borrow

tion on the note plaintiff stated that once who had been applied on the money that plaintiff put the note in the safe where it was signed and laid over on the top shelf of the safe and applied some when which was the note and some of which got on the money that he signed it off a level. He further testified that defendant never borrowed $20.00 from him; that the day before defendant borrowed the money he asked he wanted to make a payment on the property and promised to bring the money within two or three weeks; that defendant never borrowed $20.00.

The defendant was then called in his own behalf and testified through an interpreter that he was a laborer working for a railroad company; that he was a Japanese by birth and had lived in this country sixteen years; that he had known plaintiff for a long time and transacted his business; that about 1928 he borrowed $40.00 from him and repaid it in two or three weeks; that at the time he borrowed the money he signed a paper. He then identified his signature on the note and said that he did not know what it was when he signed it. He testified that $40.00 is more than he made in a month; that plaintiff said he had not time to give it to him then but that plaintiff would "bring him up." Defendant further testified that he paid plaintiff $10.00 for money in 1929, which he had used out of a bureau which was been left in his back yard and later which was stolen, and the money borrowed December $20.00; that the defendant refused to make more payment on lines claimed that the building remaining in the burned away; that defendant had been just about four months of the mortgage. He further testified that he never borrowed $20.00 from plaintiff; and that he did borrow

money from a loan association; that at the time he paid plaintiff the $100.00 he did not get a receipt; that plaintiff stated that he would give him a receipt after he paid the $300.00.

The defendant called James I. Ennis who testified that he was a lawyer and an examiner of disputed handwritings and had been for forty years; that he had twenty-five years experience with a bank in passing on handwritings; that he had testified in a great many cases as a handwriting expert. He then testified in detail as to alterations made upon the note. Plaintiff then called Julius Strumil who testified that he was a brother of plaintiff and was working for him as a bartender in 1915; that on April 13, 1915, defendant came to the saloon and borrowed $700.00 from plaintiff; that plaintiff asked the witness to get the box in which the money was kept and that plaintiff then counted $700.00 and gave it to the defendant after the defendant had signed a note for that amount which had been filled out by the plaintiff; that at that time Peter Skibutnas was present; that he saw the defendant in 1919 pay $100.00 to the plaintiff and that plaintiff gave him a receipt for it at that time. He further testified that the barrel of whisky which was in defendant's yard belonged to him and that he bought it for his own use prior to the going into effect of the prohibition law; that he took it away from defendant's home in December, 1919, in the night time.

Peter Skibutnas testified for the plaintiff that on the evening of April 13, 1915, he was in the plaintiff's saloon when the defendant came in; that he saw plaintiff write out a receipt or something of that kind and defendant signed it; that plaintiff then told his brother Julius to bring him the box in

money from a loan association; that at the time he gave plaintiff the $100.00 he did not give a receipt; that plaintiff stated that he would give him a receipt after he paid his $50.00.

The defendant called Owen L. Davis who testified that he was a lawyer and an attorney at Kingfisher County; that he had been for forty years; that he was twenty-five years acquainted with a bank in getting on business; that he was familiar as a great many cases on a mortgaging company. He also testified in detail as to attorneys fees upon the note. Plaintiff then called Alfred Ziegler who testified that he was a brother of plaintiff and was working for him as a bartender in 1919; that on April 13, 1919, defendant came to the saloon and borrowed $100.00 from plaintiff; that plaintiff asked the witness to get the box in which the money was kept and that plaintiff then received $100.00 and gave it to the defendant; that after the defendant had signed a note for that money which had been filled out by the plaintiff; that at that time other witnesses was present; that on the afternoon of April 20 $150.00 to the plaintiff and that plaintiff gave him a receipt for it at that time. On further examination that the interest of mortgage money was in plaintiff's pocket; he was sure that he thought it for one day was prior to the going into effect of the prohibition law; that he took it away from defendant's home in December, 1919, on the night time.

Peter Oklahoma testified for the plaintiff that on the evening of April 13, 1919, he was in the plaintiff's saloon when the defendant came in; that he saw plaintiff write out a receipt on something of that kind and defendant signed it; that plaintiff then took the receipt and defendant left; that

which the money was kept, which was done, and then plaintiff counted out money and gave it to the defendant; that there was a pile of bills. Plaintiff then took the stand in rebuttal and testified and he filled out the note at the time he loaned defendant the money; that the ink he was using was not good and that he then got another bottle of ink which was a different color; that he did not use two pens but wiped the first ink from the pen before using the second. This is substantially all the evidence in the record.

The plaintiff contends that the judgment is wrong and should be reversed because evidence was introduced by defendant tending to show that the note had been altered and this was not admissible because not alleged in defendant's affidavit of merits; that there was, therefore, a variance. No such point was made on the trial and no objection was there made that the evidence was not within the affidavit of merits. It is elementary that a variance must be specifically pointed out at the time. It cannot be urged for the first time in a court of review. Moreover, we think there is no merit in the point. We are clear that the affidavit of merits was sufficient to admit all the evidence thatwas offered or received in this respect.

Plaintiff further contends that the verdict is against the manifest weight of the evidence. We have set forth the evidence rather fully. If the jury believed defendant's testimony, as they had the right to do, it was clearly sufficient to warrant a verdict in his favor. For, among other things, it appears that although the note was dated April 13, 1915, and due on demand with interest at 6%, plaintiff testified that it was to be repaid within two or three weeks, and al-

which the money was lost, which was done, and how plaintiff counted and knew it to be defendant's; that there was a pile of bills. Plaintiff then took the stand in rebuttal and testified she had filled out the book at the time he handed it to her. Plaintiff's counsel then asked the witness if he was using any good and that he then got another bottle of the same kind and a different color; that he did not see him put signs first the first one before using the second. This is substantially all the evidence in the record.

The plaintiff contends that the judgment is wrong and should be reversed because evidence was introduced by defendant tending to show that the boy had taken liquor and that the public taverns had slipped in intoxicated affidavits of vendors that that was. However, a material fact was not held was sold to the boy and be effective was there such the evidence was not within the affidavit of merits. It is elementary that a verdict must be unanimously pointed out at the time. It should be signed for the first time in a court of record. However, we think there is no merit in the point. We are clear that the affidavit of merits was sufficient to admit all the evidence thereon offered or received in this regard.

Plaintiff further contends that the verdict is against the manifest weight of the evidence. We have not full the evidence rather full. If the jury believed unfavorably testimony, is they had the right to do, it was clearly sufficient to support a verdict in his favor. For, among other things, it appears that Clement, the boy, was born April 12, 1913, and was on Sunday with testimony as 23, plaintiff testified that at the 24 in regard giving to at their meeting, the ex-

though the defendant lived in the neighborhood and had property and was a frequenter of plaintiff's saloon, there is no evidence in the record that any demand was made for payment. And then, too, there was evidence that the note had been tampered with and altered, but whether this was a material alteration would not be controlling if the jury believed, as defendant testified, that at the time he signed the note he only received $20.00. This suit was between the payee and the maker. There is ample evidence in the record that, if believed, warranted the verdict of the jury, and since we cannot say that their finding is against the manifest weight of the evidence, the judgment must be affirmed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Murder was referred lived in Hermelinstrand and his property was use a temporary of electricity meters. There is no ques- where is the proof such our should we also the majority. The also, too, there was evidence that the wife had been tampered with and altered, but whether this was a material alteration would not be satisfying if one jury believed, or believed tempting, that at one time we might the have to rely on- alleged fact. This suit was between the payee and the maker. There is ample evidence in the record that, if believed, was- ranted the verdict of the jury, and there is nothing any that there trading is against the manifest weight of the evidence, the judgment must be affirmed.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TRUMBULL, P.J. and SCHADE, J. concur.

392 - 27350

BUFFALO WASTE PAPER CO.,
a corporation,
Appellant,

v.

FRANCIS HUGHES,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

228 I.A. 225

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover the purchase price of two car loads of waste paper, amounting to $812.63. The case was tried before the court without a jurt and there was a finding and judgment in defendant's favor, to reverse which this appeal is prosecuted.

So far as it is necessary to state them, the facts are that plaintiff is a corporation engaged in the waste paper business at Buffalo, N.Y.; that in October, 1920, it sold two car loads of waste paper to the defendant at $33.00 per ton, f.o.b. cars Buffalo. Upon receipt of the order plaintiff loaded the two cars and shipped them on November 2d and 3d, 1920, as per directions to the Ironside Board Corporation at Thomasville, Conn., which company conducted a paper mill at that place. Upon arrival of the cars the Ironsides Company rejected the paper on the ground that it was of inferior quality. Afterwards it seems that the paper was sold by the railroad company for charges. Plaintiff demanded payment of the defendant which was refused.

The contract under which the paper was sold provided

that the sale was "subject to mill returns." The chief contention on the trial was as to the meaning of these words, plaintiff taking the position that the mill in Connecticut could not reject the paper if it was in accordance with the terms of the sale, while the defendant contended that the mill could reject the paper for any reason or for no reason, and that rejection by the mill operates to relieve defendant, who was a broker, from any obligation to pay plaintiff for the paper. A number of witnesses testified on behalf of both sides concerning the trade meaning of the words "subject to mill returns." It would serve no useful purpose to analyze the testimony of the several witnesses on this point. We have carefully gone over the evidence both in the abstract and in the record and are clearly of the opinion that the trial court was wrong in construing these words to mean that the mill could arbitrarily reject the paper for any or no reason at all. We think the testimony of all the witnesses showed that the paper could not be rejected by the mill if the quality and quantity were in accordance with the terms of the sale. Under the evidence we are clearly of the opinion that the words "subject to mill returns" added nothing in legal effect to the contract, so far as the quality and quantity of the paper were concerned.

There was also evidence offered, some of which was admitted and some excluded, tending to show that the paper was not of the quality specified in the contract. The defendant offered evidence tending to show that it was not of thatquality. Some of this evidence related to conversations taking place between a representative of the plaintiff and the defendant after the suit was brought. It was objected that this was not admissible because the conversations occurred after the commencement of the suit and this objection was sustained. Counsel for

both sides, in some degree at least, seem to have misled the court on this proposition. If the evidence tended to show that the paper was not of the quality specified in the contract, it was admissible regardless of when this fact appeared, whether before or after the commencement of the suit. There is no magic about the commencement of an action that will bar or admit evidence.

Since the court excluded some of this evidence and apparently did not pass upon this question in its decision, but erroneously construed the language of the contract, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

404-27568

OLIVE ADAMS JOHNSTON, et al.,
Appellees,

-vs-

DONNEL SAFE COMPANY, et al.,

On Appeal of EDWARD J. BARTELME,
Appellant.

Appeal from
Circuit Court,
Cook County.

228 I.A. 625

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal the defendant, Edward J. Bartelme, seeks to reverse a decree of the Circuit Court of Cook County granting the relief prayed for in complainants' bill and dismissing defendant's cross-bill for want of equity.

It was decree in this case that a 99 year lease on certain real estate located at 227-229 West Washington Street, together with assignments thereof, be removed as a cloud upon the title to the real estate. Complainant contended, and the court found, that the tenant and its assignees had defaulted in the payment of rent, taxes and special assessments and in other respects, and that on account of such defaults the landlords had, in accordance with the terms of the lease prior to the institution of the suit, declared the lease forfeited. Following these findings the court decreed that the lease and its assignments be removed as a cloud upon the title.

Defendants' contention was that while certain installments of rent, taxes and special assessments had not been paid as required by the lease, the failure to pay was by agreement with the landlords and that the landlords had waived any and all defaults, that the lease had not been forfeited prior to the filing of the suit and, therefore, the bill should have been dis-

missed because equity will never lend its aid to declare a forfeiture.

The lease in question was executed February 1, 1907, and demised the premises for a period of 99 years at a rental of $4000.00 per annum, payable quarterly on the 1st day of February and every three months thereafter. The tenant in the lease was the Donnel Safe Company. It assigned the lease May 17, 1910, to one Samuel Messinger, and on July 15, 1917, Messinger assigned it to Oscar C. Hagen, and the latter on December 8, 1917, assigned it to Edward J. Bartelme. On December 15, 1917, Bartelme executed a trust deed to secure the payment of $10,000.00. Bartelme held the title as a mere dummy for Fred C. Ehmen and the notes and trust deed mentioned were pledged to Greenebaum Sons Bank & Trust Company as collateral security for money owed the bank by Ehmen. The Donnel Safe Company at the time of the execution of the lease entered into possession of the premises as did the several assignees at the times of the respective assignments to them.

At the time the lease was executed the property was improved with a four story and basement brick and stone building. The building was old but was in a tenantable condition. At that time the basement and first floor were occupied for business purposes and the upper three floors as a hotel. On or about November 20, 1918, when it is contended by complainants that they re-entered and re-possessed themselves of the premises, the building was badly out of repair. It had not been occupied by anyone for about six years. It was abandoned. The windows were broken, the skylight in the roof was rotted out so that the rain came in, and the down spouts were gone. The rain had been leaking into the building for a long time and had loosened

the plaster most of which had fallen down. The heating plant was of no value. Most of the radiators had been taken or stolen from the building and the boilers were rusted. The girders supporting the roof were rotten, and, in fact, the building with the exception of the walls was of little or no value.

The defendant Bartelme, as the dummy of Ehman, who procured the lease in 1917 defaulted in the payment of the installment of rent for $1000.00 due February 1, 1918. Payment was repeatedly demanded and finally in April, 1918, it was paid by Ehman giving a check dated a few days in advance. That was the first and only payment made by Bartelme or Ehman. The installments of rent due May 1, 1918, and August1, 1918, were not paid. The general taxes for 1917 amounting to $3344.87 and a special assessment of $204.01 were not paid by the tenant as required by the lease, but the landlords were compelled to pay these amounts to prevent a penalty. Attorneys' fees had been incurred in endeavoring to collect the rent, amounting to $287.26, which the lease required the tenant to pay. None of these sums or any part of them have been paid. On or about August 7, 1918, the landlords served a notice on the original tenant and all of the assignees including Bartelme and Ehman. It set forth in detail the defaults in the payment of the rent, taxes, special assessment and attorneys' fees, and the default in failing to keep the premises in repair as required by the lease. In addition it contained the following: "You are further notified that for and on account of said defaults and each of them, the undersigned propose to declare said term ended and to forfeit and terminate said lease in accordance with the provisions of said lease." The original tenant and all

assignees were served with this notice but it brought no substantial results. Nothing was done toward the payment of the amounts due to the landlords nor was there any attempt to repair the building. On or about November 30, 1918, the landlords re-entered and took possession of the premises, changed the lock on the door and made some slight repairs to the windows and skylight for which they paid about $80.00. Following this, on January 11, 1919, the bill was filed. On January 18 following Bartelme entered his appearance, and on March 8 Ehmann filed his appearance. On the latter date both Bartelme and Ehmann filed a demurrer to the bill. On March 4 the landlords entered into a new lease for a period of ten years with the Consolidated Talking Machine Company, and thereupon complainants remodeled and repaired the building, expending for repairs about $11,000.00, and for remodeling for the new tenant about $9,000.00, making a total of about $20,000.00. On March 27 complainants amended their bill. On May 14 Ehmann and Bartelme filed their joint and several answer in which they admitted the making of the lease and the assignments, but denied that there was any default in the payment of rent or in the performance of any of the covenants of the lease, and denied that the landlords had re-entered and re-possessed themselves of the premises. On April 28, 1920, complainants filed an amended and supplemental bill setting up in addition to the allegations of the original bill that they had expended in repairing and remodeling the building approximately $25,000.00. Ehman did not answer the amended and supplemental bill but was defaulted. On May 11, 1920, Bartelme filed his answer in which he denied that the 99 years had been terminated, and admitted that the installments of rent falling due May, August and November, 1918, and the taxes were not paid, but denied that there was any default by reason of this and set up

that the payments were not made by agreements with the landlord; and avers that since then the complainants have become indebted to him in a large sum greatly in excess of the rents and taxes. He further set up that when he acquired the leasehold from Hagen he conveyed to the latter real estate of the value of more than $35,000.00; that when he obtained the assignment of the lease the property was in a bad state of repair; that he acquired the lease for the purpose of re-sale and so notified the landlords and that the landlords agreed that they would not require him to repair until he had found a purchaser for the leasehold. He admitted the service of the notice by the landlords of the default and that they proposed to terminate the lease in accordance with its provisions, but set up that afterwards the complainants negotiated with him for the purchase of his interests and he was led to believe that the landlords would make no attempt to forfeit the lease; that suits were brought by the landlords for th unpaid rent against the several assignees of the lease, which are still pending. On the same day Bartelme filed his cross-bill setting up substantially the same facts as are averred in his answer, and prayed that the lease made by the landlords to the Consolidated Talking Machine Company be held a nullity and its possession declared fraudulent, and that the parties be restrained from interfering with his possession of the premises; that the amounts received by complainants from the talking machine company may be ascertained And that an accounting be taken of the amount due to Bartelme from the landlords by reason of their wrongful acts, and that they be decreed to pay him what amount, if any, should appear to be due him, he being ready and willing to pay whatever should appear to be due from him to them.

By the terms of the 22 year lease the original tenant and its assignees agreed to keep the building repaired and in as

good condition as it was on the date of the lease, February 1, 1907. It was further covenanted and agreed that if default be made by the tenant or its assignees in the payment of the quarterly rent or in any other of the covenants of the lease, "and such default continue for ninty (90) days after notice thereof ina writing to said lessees or its assignees, it shall and may be lawful for said lessors at their election to declare said term ended" and to re-enter the premises with or without process of law, and all demand for possession of the premises was waived as well as any notice excepting notice of default.

The defendant contends that the bill was filed to declare a forfeiture of the lease, and that it is the law that equity will not interfere on behalf of a party to enforce a forfeiture but will leave him to his remedy at law. And it is pointed out that it is alleged in the original bill that on account of the several defaults "complainants have elected to forfeit and terminate said lease and to re-enter said premises * * * * * and have declared and do now declare said lease forfeited and determined;" that the record of the lease and the various assignments and trust deed are cloude upon the title of complainants and should be removed; that the prayer of the bill is that the court may find and decree that default has been made in the payment of rent due and that it find and decree that complainants have elected to declare and have declared said lease forfeited and terminated, and that the court may remove defendants from possession of said premises and put complainants into possession thereof. It is further pointed out that afterwards these parts of the bill were eliminated by amendment and it was alleged in the amendment that the complainants had forfeited the lease and had re-possessed them-

selves and were in the sole and exclusive possession of the premises and prayed that the lease and assignments thereof be removed as a cloud. Cases are cited from this court and the Supreme Court repeatedly announcing the rule that equity abhors a forfeiture and will not declare or enforce it. The general rule of law is as counsel for defendant Bartelme contends, but it is not applicable to the case at bar. We think that here there was a determination of the lease on November 30, 1918, before the suit was brought, and in these circumstances equity will remove the lease and assignments as a cloud upon complainants' title to the property and in doing so decree that the lease had theretofore been forfeited. Harper v. Tidholm, 155 Ill. 370; Lanz v. Heinemann, 277 Ill. 388. To the same effect are Pindell v. Union Min. Co., 84 Wisc. 174, and Dressler v. Lemvon Co., 140 Fed. 801.

In the Harper case a bill was filed to remove a contract as a cloud on the title to property, which contract had been forfeited. The court said, (p.378): "Something is said in the argument about the rule that a court of equity will never enforce either a penalty or a forfeiture, and that the decree in this case is erroneous in that it declares the contract forfeited, * * * * The forfeiture had been declared by the complainant and the contract ended by him, in strict accordance with its terms, before the bill was filed, but Harper having placed the contract on record it was a cloud on his title, and the bill was filed to remove that cloud. In affording this relief,it of course became necessary for the court to determine whether the constract was still subsisting or not, and the effect of the decree was to find that it had been terminated in accordance with its terms, by the acts of the parties them-

selves, and that it was therefore null and void and a cloud upon the title."

In the Lang case a bill was filed to remove a cloud, and in discussing the law which we now have under consideration, the court said (p.377): "Counsel for plaintiff in error further argue that the result of the decrees is that a court of equity is lending its aid to enforce a forfeiture of the $1000.00 earnest money. Undoubtedly, under the authorities, equity will not declare or enforce a forfeiture where it is harsh or inequitable to do so. (Turk v. Stearnson, 264 Ill. 310, and cited cases,) but all the authorities recognize that competent parties may make a contract as to penalties and forfeitures, and that courts of equity, as well as courts of law, will recognize the rights of the parties as to such penalties or forfeitures. Here a court of equity is not enforcing a forfeiture. The decree simply holds that the defendants in error rightfully declared a forfeiture under the contracts." The court then quotes from the Harper case, supra, with approval.

While the allegations of the original bill might tend to indicate that complainants had not forfeited the lease but were then asking the court to do so, yet we think they had a right to amend their bill and eliminate these allegations, and that they would be entitled to a decree provided the lease had been terminated before the filing of the suit if the proof would warrant such finding. And we think the proof clearly warranted the finding in the decree that the lease had been forfeited prior to the filing of the suit.

Nor is there any merit in the objection made to the notice of default which was served on the defendants. It is contended, as we understand it, that the notice is insufficient

because after setting up the defaults it says that complainants "propose" to declare the term ended and to forfeit the lease, and that this is not a specific statement that the lease will be terminated or is thereby terminated. The lease provided that 30 days notice of default should be given before it could be declared terminated. It could not be terminated by a statement in the notice because the provision required a period of 30 days to elapse after the giving of such notice. During the 30 day period no attempt was made by defendant to relieve himself of any of the defaults mentioned. The notice was in accordance with the provisions of the lease and was clearly sufficient. The finding of the chancellor that the complainants on November 30, 1918, re-entered and re-possessed themselves of the premises we think is amply sustained by the evidence. Nor are we of the opinion that the contention of the defendant to the effect that the complainants wrongfully obtained possession of the premises by securing the key from defendants' agent, Keebler & Co., is sustained by the evidence. On the contrary, we think the evidence is such as to warrant the finding of the chancellor that the complainants properly obtained possession of the premises.

It is further contended that the court should have granted the relief prayed for by the defendant Bartelme in his cross-bill. The record discloses that Bartelme was a mere dummy for Ehman and that he had no interest whatever in the property except to hold the bare legal title for Ehman. He did not appear at the trial, although he filed his answer. Ehman appeared and testified but did not file an answer the bill. He was defaulted. He testified that he had given as a consideration for the assignment of the lease to Bartelme for himself equities to properties the value of which he placed at $43,000.00, but the

evidence as to such property is very vague and uncertain. It was only when Ehman was testifying on the trial that he admitted for the first time that Bartelme was his dummy and held the title for him.

After the lease was assigned to Bartelme, Ehman appeared as a broker representing Bartelme and demands for payment of rent were repeatedly made upon him, as agent for Bartelme, and it was only after complainants had secured the services of a lawyer and had made repeated demands that the $1000.00 was finally paid. No other payment was made. No taxes or assessments were paid and in the joint and several answer filed by himself and Bartelme he denies that there were any defaults at that time. In the answer which Bartelme filed to the supplemental bill, on which the case went to trial, Ehman does not answer at all but had defaulted, and Bartelme, while admitting that the taxes, rent and attorneys' fees have not been paid, denies that there is any default, but on the contrary claims that the complainants were indebted to him in a large sum, and then the prayer of his cross-bill is that if there is an accounting and he is found indebted, he will pay what is due. It is undisputed that there were repeated defaults and no attempt to pay by either of these defendants, and as an excuse it is said that there was a great depression at the time in question in the real estate markets and in all matters on account of the great war. But this did not relieve Bartelme and Ehman from paying their rent or complying with the other provisions of the lease. It is perfectly apparent that neither of these parties intended to make any payment, but their hope was to dispose of the lease to other parties. Upon a consideration of the entire record we are clearly of the opinion that there were no equities

in favor of Ehman or Bartelme, and the court could do nothing under the law but dismiss Bartelme's cross-bill.

Separate appeals have been prosecuted by the defendants Fred C. Ehman and Oscar C. Hagen, and a short record has been filed by each of them. By an order of court these appeals have been taken on one brief filed on each side, and we will dispose of them here. It is said that the decree is improper as to Ehman because while he was named as a defendant in the amended and supplemental bill it contained no allegation against him except that notice of default was served upon him; that he permitted a default to be entered against him believing that he could safely do so; that the decree contains findings of fact against him which are not based upon any allegation of the bill in that it finds that Bartelme executed certain notes for the accommodation of Ehman and that Bartelme holds the title for Ehman; that Ehman never expended any money at any time in the repair or restoration of the building and it is argued that none of these matters were in issue at the trial. We think the point is not tenable. The testimony of Ehman himself discloses for the first time that the lease was held by Bartelme as a dummy for him, and it is undisputed that Bartelme never put any money into the property and that the notes he executed which were placed with Greenebaum's Bank for Ehman's benefit were without consideration. It was further necessary under the evidence to show that Ehman never expended any money in the repair or restoration of the building.

Nor do we think there is any merit in the contention made on behalf of Hagen. He assigned the lease to Bartelme and was liable on the covenants of the lease as long as it was in force and effect, and it is argued that the record discloses that a suit at law had been instituted against Hagen for the recovery

in favor of Simon or Brisbane, nor has money could be obtained under the law was Alderman Davidson's over-well.

Separate argument have been presented by the defendants Fred G. Simon and Dave G. Bryan, and I must confess has been fair by each of them. By an order of court these cases were heard when no one had fair time on each side, and we will disposed of them here. It is not that the course is important as Mr Simon contend that he was forced to a judgment in the municipal and municipal jail is contrary to civilization, rather than action if criminal has carried upon being. That it presents a defense to be entered against him yielding that is equally worthy to say. That the course constitute Chairman of Ward Alderman Bin which has not based upon the allegation of the fail in the case it fixed Bryan Statutes misdirect criminal matter for the accommodation of Simon but that Statutes which the right for Simon; that Simon never attempted any money at any time in the matter or transaction of law building but it is proved that when at Bryan matters were in issue by the total. He which his point be has broken. The testimony of Simon brought discovery for the first time that the Simon was held by Bryan on a bond the law, not is to mentioning that Defendant serve in the money the property and that the action is remained fair.

Planter this Chairman's Book in Court's Equity not right manifestation. It was Judge mentioning which the relative to show that Simon never signated any money in his receipt or indentation of the building.

Now do we think there is any error in the instructions made on behalf of Bryan. He assigned the jury in motion and are liable on the advantage of the Bryan is long if it has to have the effect, and it is argued that the proof indicates that

of rent, and in the event of recovery he would be held responsible for the default of Bartelme and has no means to protect himself; that the only protection he would have would be the leasehold itself, and that if it was declared forfeited, it would work a great injustice to him. It is further contended that if the prayer of the cross-bill is granted and the lease held to be in force and effect, then if Hagen is required to pay any amount that may be found due, he may have his rights against Bartelme on the leasehold. It is also argued that the decree found that Hagen remained and "was still and is liable upon the covenants, promises and agreements contained in the lease"; that this was an improper finding in a bill to remove a cloud, no such issue being before the court. The decree further provided that it should not "prejudice the rights or defenses of any defendant hereto in any proceedings or actions at law or in equity now pending or hereafter instituted by complainants against any defendant hereto." We think the findings were unnecessary and may be disregarded in view of the finding last quoted. Moreover, Hagen filed a disclaimer and consented that a decree be entered as prayed for in the amended bill.

Under the terms of the lease and the assignments, Hagen might be held liable for the rent until the lease was terminated. The decree does not effect his interests in any respect so far as any defense he may make to any action that may be brought against him is concerned. This is shown by an express provision of the decree itself. There is no merit in the point.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

486-27454

OLIVE ADAMS JOHNSTON, et al., Appellees, -vs- DONNEL SAFE COMPANY, et al.,	Appeal from Circuit Court, Cook County.
On Appeal of OSCAR C. HAGEN, Appellant.	

MR. JUSTICE O'CONNOR delivered the opinion of the court.

What we have said in the opinion this day filed in the case of Olive Adams Johnston, et al. v. Donnel Safe Co., On Appeal of Bartelme, Gen. No. 27362, disposes of this case, and the decree of the Circuit Court of Cook County is, therefore, affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

27455
487-27455

(28179)

OLIVE ADAMS JOHNSTON, et al., Appellees,	
-vs-	Appeal From
DONNEL HATS COMPANY, et al.,	Circuit Court,
	Cook County.
On Appeal of FRED C. ZEMAN, Appellant.	

223 I.A. 1975

MR. JUSTICE O'CONNOR delivered the opinion of the court.

What we have said in the opinion this day filed in the case of Olive Adams Johnston, et al. v. Donnel Hats Co. et al., on appeal of Bartelme, Gen. No. 27388, Abstracts of this case, and the decree of the Circuit Court of Cook County, therefore, is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

417 - 27375

LEONA BOLDUAN, a minor, by AMANDA BOLDUAN, her next friend, Appellee,	APPEAL FROM
v.	CIRCUIT COURT,
JOHN H. LATSIS, Appellant.	COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, a minor, by her next friend, brought suit against the defendant to recover damages claiming that he had suffered water to remain upon the floor of a store conducted by him, which rendered the floor slippery and by reason of which plaintiff slipped and fell fracturing the fibula and tibia of her right leg above the ankle. There was a verdict and judgment in her favor for $4,000.00, to reverse which the defendant prosecutes this appeal.

The material facts in the case are not in dispute. They are as follows: plaintiff, a minor of about fourteen and one-half years of age at the time in question, lived in Oak Park, and on the morning of March 25, 1919, while on her way to high school entered defendant's place of business, which was located at the northeast corner of Harlem avenue and Madison street, Oak Park, to purchase a stick of gum; that, after she made the purchase, she turned to leave the store, and, in doing so, slipped and fell breaking the two bones of her leg. She was taken to her home in a police ambulance and afterwards removed to a hospital where the fracture was reduced. There appears to have been

a good union of the bones, although she still felt some effects of the injury at the time of the trial, February 1, 1921. The evidence further shows that the store fronted about 25 feet on Madison, an east and west street, and about 75 feet on Harlem avenue. The Madison street front was of plate glass, and the door in the corner was also of glass, and on the west side facing Harlem avenue there was plate glass extending from the door north a distance of about 20 feet. A short distance from the door and near the west wall was a cigar case, immediately adjoining this on the north was a candy counter, while near the east wall was a soda fountain. In the rear part of the store were tables and chairs for the use of defendant's patrons. The floor was covered with new linoleum. About 7:45 o'clock in the morning of the day in question two police officers whose duties required them to be in the neighborhood of defendant's store went into the store and talked with defendant, as was their custom. At that time defendant was engaged in mopping the floor, for which purpose he used a bucket, to which was attached a wringer, and an ordinary mop. He began near the door and would mop a section five or six feet square at a time and dry it with the mop. This process was continued until he was more than 25 feet from the front of the store. At this time, which was about five minutes after eight, plaintiff, on her way to the Oak Park High School, came into the store and asked defendant for a stick of gum, which was given to her at the candy counter north of the cigar case. She then turned and was proceeding toward the door and, when she was four or five feet from it, she slipped and fell. She screamed and said that she had broken her leg. The officers assisted her to a chair and then called the police ambulance and took her to her home.

a good view of the house, although the still full moon
effects of the injury at the time of the trial, February 4,
1921. The evidence further shows that the house fronted
about 25 feet on Madison, on east and west street, and
about 75 feet on Marion avenue. The dwelling stood front
was of plate glass, and the door in the corner was also of
glass, and on the west side facing Marion avenue there was
plate glass extending from the door north a distance of
about 20 feet. A short distance from the door was near the
west wall was a sign post, immediately adjacent thereto
the north was a candy counter, while near the east wall was
a soda fountain. In the rear part of the room were tables
and chairs for the use of patrons's patrons. The floor was
covered with new linoleum. About 7:45 o'clock in the morn-
ing of the day in question two police officers came during
regular line in to investigate of defendant's store
went into the store and talked with defendant, as was their
custom. At that time defendant was engaged in mopping the
floor, for which purpose he used a bucket, in which was
situation a mopper, and an ordinary mop. He began near the
door and worked up a section five or six feet square at a
time and dry it with the mop. This process was continued until
he was more than 25 feet from the front of the store. At this
time, with his back to the door, he was facing, directly, at
her back to the door. Mrs. Ruth Dennis, came into the store
asked defendant for a quart of gas, which was given to her at
the candy counter north of the sign post. She then turned
and was proceeding toward the door out, when she was shot in
five feet from it, she slipped and fell. She returned and said
that she had broken her leg. The officers went to her
chair and then called the police ambulance and took her to

The testimony shows without contradiction that the front part of the floor of the store extending back for more than 25 feet had been scrubbed and dried with the mop; that there was no water upon it but that it was damp.

Plaintiff testified that when she came into the store and as she was leaving the store she did not look at the floor. And counsel for defendant argues from this that plaintiff was guilty of contributory negligence and, therefore, the court should have directed a verdict for defendant. With this contention we cannot agree. Under the circumstances disclosed, the store was open for business and there was no occasion for plaintiff to look at the floor. We think it clear that it cannot be said that she was guilty of contributory negligence as a matter of law or as a matter of fact.

Complaint is also made that the court admitted over defendant's objection improper evidence on behalf of plaintiff in that counsel for plaintiff was permitted to cross-examine his own witness, Officer Miller. The witness admitted he had changed his mind in some respects, and we think there was no error on the part of the court in permitting counsel for plaintiff to examine the witness as he did. Nor was there any error in the admission of the testimony of the physician who attended plaintiff in reducing the fracture. It is obvious that the attending physician was the one most competent to describe plaintiff's injuries to the jury. Neither is there any merit in defendant's objection to the testimony of the witness, Mrs. Seitz. Officer McAlear, who was in the store at the time plaintiff was injured, and who, with Officer Miller, took plaintiff to her home, testified for the defendant. In the performance of his duties he was frequently required to

The testimony above of their conversation that the firing part of the flare of the store exploding had more than 20 feet had been searched and dried up to the map; that there was no water upon it but that it was damp.

Plaintiff testified that when she came into the store and as she was leaving the store she did not look at the flare. She removed the [illegible] from the fly that plaintiff was going to establishes negligence and, therefore, the court should have directed a verdict for defendant. With this testimony we cannot agree. Under the circumstances disclosed, the score was open for business and there was no occasion for plaintiff to look at the flare. We think it clear that it cannot be said that she was guilty of contributory negligence as a matter of law or as a matter of fact.

Complaint is also made that the court admitted over defendant's objection incompetent evidence on behalf of plaintiff in that counsel for plaintiff was permitted to cross-examine his own witness, Officer Miller. The witness testified he had changed his mind in some respects, and he claimed there was no error on the part of the court in permitting counsel for plaintiff to examine the witness as he did. Nor was there any error in the admission of the testimony of the physician who attended plaintiff in removing the fragments. It is obvious that the attending physician was the best competent to describe plaintiff's injuries to the jury. Neither is there any merit in defendant's objection to the testimony of the wife, Mrs. Smith. Officer Miller, who was in the office at the time plaintiff was injured, and who, with Officer Miller, took plaintiff to her home, testified for the defendant. In the performance of his duties in the Community [illegible]

pass defendant's store and on numerous occasions went in and talked with defendant. Counsel for plaintiff was endeavoring to show that this officer was friendly to defendant and that his testimony might, therefore, be biased in defendant's favor. After this witness testified that the floor was dry after having been mopped, he was asked on cross-examination whether he had not said at the time he took plaintiff home immediately after she was injured that the floor of the store was "as slick as glass." This he denied and afterwards in rebuttal defendant called Mrs. Seitz, who was at plaintiff's home when plaintiff was brought in by the officers, and who testified that Officer McAlear made that statement. Counsel for defendant in his opening brief argues that this was improper as it was not part of the res gestae. Counsel for plaintiff admit that this was not part of the res gestae, but that the evidence was proper as it tended to show that the witness had made statements contradictory to his testimony in court. Counsel for defendant now argues in his reply brief that this was improper because it was gone into on cross-examination. The contention of the defendant is not properly before us. On the trial the objection was but general. No reasons were pointed out, nor was it there contended that the testimony of Mrs. Seitz was not part of the res gestae, nor was the other contention there made. It is elementary that an objection cannot be raised for the first time in this court, but in any event the point is without merit. It was clearly competent for plaintiff to show if she could that the witness had made contradictory statements as to the condition of the floor.

Nor do we think that it can be said that the judgment is excessive. The damages awarded may be larger than would

pane defendant's store and on numerous occasions were in and talked with defendant. Counsel for plaintiff was endeavoring to show that this officer was friendly to defendant and that his testimony might, therefore, be biased in defendant's favor. After this witness testified that the floor was dry after parting had happened, he was asked on cross-examination whether he had not said at the time he took plaintiff home immediately after she was injured that the floor of the store was "as slick as glass." This he denied and afterwards in rebuttal defendant called Mrs. Hollis, who was at plaintiff's home when plaintiff was brought in by the officers, and she testified that officer Dahmer said that exactly. Counsel for defendant in the opening brief argues that this was improper as it was not part of the res gestae. Counsel for plaintiff claim this was not part of the res gestae, but that the evidence was proper as it tended to show that the witness had made statements contradictory to his testimony in court. Counsel for defendant now argues in his reply brief that this was improper because it was gone into on cross-examination. The contention of the defendant is not properly before us. In the trial the objection was but general. In reason were pointed out, nor was it there contended that the testimony of Mrs. Hollis was not part of the res gestae, nor was the other contention there made. It is elementary that an objection cannot be raised for the first time in this court, but in any event the point is without merit. It was clearly competent for plaintiff to show if she could that the witness had made contradictory statements as to the manner of the fall.

But it is quite clear it can be said that the judgment is conservative. The damages awarded may be larger than would

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have been sustained a few years ago. On the question of the amount the earlier decisions of this State are of little assistance. We cannot be unmindful of the fact that the money value of life and health is appreciating and the purchasing power of money depreciating during recent years. Rosch v. C. Rys. Co., 221 Ill. App. 241; DePilliori v. Spring Valley Coal Co., 202 Ill. App. 61; Delchery v. Quinlan, 210 Ill. App. 321; Girdzus v. Van Etten, 211 Ill. App. 533.

The defendant contends that the court erred in failing to direct a verdict in its favor at the close of all the evidence because the evidence shows that the defendant was not guilty of any negligence as a matter of law. Where a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed. Libby, McNeill & Libby v. Cook, 222 Ill. 206. The general rule is that whether the defendant is guilty of negligence is a question of fact for the jury, but when the facts are admitted and all reasonable minds would agree that the defendant was not guilty of negligence, the question is one of law for the court. Howes v. C. & N.I. R. R. Co., 217 Ill. 500; Austin v. Public Service Co. 299 Ill. 112. Defendant in the conduct of his store was, under the law, required to exercise reasonable care for the safety of his customers. Frost v. McCarthy, 200 Mass. 445; Buckingham v. Fisher, 70 Ill. 121. Under the evidence in this case we think that all reasonable minds would reach the conclusion that defendant was not guilty of any negligence in mopping the floor of his store. There was no water - that is in such a quantity as would be visible - on the floor where plaintiff was injured. It had been mopped and dried in the

ordinary manner. The floor was only damp. In these circumstances we are of the opinion that whether the defendant was guilty of any negligence was a question of law for the court, and that he should have directed a verdict for the defendant because the evidence fails to show that the defendant did not conduct his store with that degree of care required by law.

Under these circumstances the judgment of the Circuit Court of Cook County is reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

200 - 27157

STANLEY SOBAS, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT, COOK COUNTY.
SHENANDOAH AUTO LIVERY COMPANY, Appellant.	)	

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment of $4,000.00 entered in the Superior Court of Cook County against the defendant, the Shenandoah Auto Livery Co., on account of personal injuries which it is claimed were sustained by the plaintiff, Stanley Sobas, on July 4, 1915, as a result of a collision between an automobile driven by one of the defendant's servants and a motor cycle which was being ridden by the plaintiff.

The declaration consists of three counts. The first count charges general negligence; the second count, reckless speed; and the third count, a failure to blow a horn or give warning. The defendant filed a plea of the general issue; a plea of non-ownership and a plea of the Statute of Limitations. The last two pleas were waived on the trial.

The theory of the defendant is that as a funeral procession was going south crossing the intersection, the plaintiff drove his motorcycle at an excessive rate of speed into the intersection, undertaking to cross between the first and second automobiles of the funeral procession, and through his carelessness and as a result of the speed at which he was

going had to swerve to the south and, then, being unable to get safely across, collided with the automobile and in consequence was injured, and that at the time in question the driver of the automobile was in the exercise of care.

On the other hand, it is the theory of the plaintiff that he was carefully driving his motorcycle, at a low rate of speed, into the intersection, but owing to the excessive speed of the automobile, he was unable to get across and had to swerve to the south and then near the central point of the intersection was struck by the defendant's automobile, and, as a result, seriously injured.

The plaintiff was born in Poland. At the time of the collision, July 4, 1915, he was nineteen years of age and had lived at 717 South Harrison Street, Chicago for seven years. His occupation was that of machinists and his wages were $9.00 a week. He spoke English very brokenly.

The collision occurred near the central point of the intersection of Crawford and Grand avenues, Chicago. Crawford avenue runs north and south and Grand avenue runs northwest and southeast crossing Crawford avenue at an angle of about sixty degrees. There are double street car tracks on both streets.

The defendant is in the motor livery business and on the day of the collision had furnished about ten automobiles for a funeral. The funeral procession was going south on Crawford avenue on its way to the Forest Home Cemetery; there were three automobiles in front of the hearse; the collision occurred between the second automobile of the procession and the motor cycle on which the plaintiff was riding.

going had to remain on its main road. Then, being unable to get safely around, pulling into the shoulder and in the meantime was injured, and then at the time in getting the driver of the automobile was in the exercise of care.

In the video case, it is the duty of the plaintiff that he was actually driving its motorcycle, at a low rate of speed, into the intersection, but while in the exercise care of the automobile, he was unable to get around the car he meets in the middle of the intersection and struck by the defendant's automobile, and, as a result, virtually injured.

The plaintiff was born in Texas. At the time of the collision, July 4, 1973, he was eighteen years of age and had lived in TX Dodge County Texas, during the seven years. His occupation was that of mechanic and the wages were $1.00 a week. He spoke English very fluently.

The collision occurred near the central point of the intersection of Crawford and Cross streets, Dodge. Crawford avenue runs north and south and Cross avenue runs northwest and southeast crossing Crawford avenue at an angle of about eighty degrees. There are double sidewalks and trees on both streets.

The evidence is in the joint library bundle; and on the day of the collision the plaintiff was in the automobile in a Tractor. The Tractor possession was going south on Crawford avenue on its way to the Farmer Dodge Company; there were three automobiles in front of the tractor; the collision occurred between the second automobile of the procession and the tractor with in which the plaintiff was riding.

Sobas, the plaintiff, who had experience riding a motor cycle for about five months, on the day in question, on an Indian motor cycle, left his home at 1526 West Huron street at about 12:45 P.M. to go to Cragin. He testified that he rode west on Grand avenue between the street car track and the north curb stone, about a foot from the street car track; that as he approached Crawford avenue one automobile had crossed Grand avenue; that he did not see the hearse, nor any street cars going north or south on Crawford avenue; that, at the time, he was riding his motor cycle about six or seven miles an hour; that when he got to the east sidewalk of Crawford avenue he was going straight ahead; that first he looked south, and then he looked north and, when looking north, saw the automobile in question about 50 to 55 feet away from him; that the automobile was about opposite the middle of the power house, which stood near the northwest corner of the intersection, and was in the west street car track going fast; that as he reached Crawford avenue he was going about 6 or 7 miles an hour. In one place he says when he first saw the automobile he was about ten or fifteen feet from the place in the street where he was struck by the automobile. Through an interpreter the witness testified, "I was going straight on Grand avenue and as I seen the automobile about to hit me, traveling fast, I tried to dodge it and then I was in the middle of the street and thrown on Crawford." He testified further that when he reached Crawford avenue, he was between the westbound track on Grand avenue and the north curb; that his motor cycle at the time of the collision was headed west; that the back wheel of the motorcycle and the automobile collided. He further says that it was the bumper of the automobile that collided with his motorcycle; that the bumper hit him and threw him about

Again, the plaintiff, who had charged upon finding a motor cycle for about five months, on the day in question, on an Indian motor cycle, left his home at 1222 West Bryan Street at about half-past 8 A.M. on up to Oregon. He testified that he took what is known avenue between the corner our street and the north and south avenue, about a foot from the street car tracks; that as he approached Crandlemere avenue one automobile had crossed Grand avenue; that he did not see the driver, nor any other; he was riding the latter part about six or seven miles an hour; that when he got to the east sidewalk of Crandlemere avenue he was going slowly; that first he looked south, but did not see anything; then looking north, and the automobile in question about 30 to 50 feet away from him; that the automobile was about or near the middle of the street, and in front of the northwest corner of the intersection, and was in the act of crossing our track going west; that as he reached Crandlemere avenue he was going about 6 or 7 miles an hour. In his plain, he says when he first saw the automobile he was about ten or fifteen feet from the corner in the street where he was struck by the automobile. Through an interpreter the witness testified, "I was going straight on Bryan avenue and he came from automobile where he was, approaching that. I tried to dodge it and then I was in the middle of the street and thrown on Crandlemere." He testified further that then he reached Crandlemere avenue, he was thrown his motorcycle and fell on the north side of the street, that the motor cycle was equal at the time of the collision was moving west; that the back wheel of the motorcycle was the automobile collided. He further says that it was the bumper of the automobile that collided with his motorcycle; that the bumper hit him on the right side about

six or seven feet over on the west side of the automobile and landed him on Grand avenue near the southwest corner. At the time of the collision he had on leather leggins and leather shoes. After being struck he was taken in an ambulance to St. Ann's Hospital at 48th and Thomas streets. Subsequently his leg was amputated. He further testifies, that the automobile in question gave no warning of any kind.

On cross-examination he testified that the fastest he ever rode that motorcycle was ten to twelve miles an hour; that it was a second hand machine which he bought for $45.00; that when going ten miles an hour he could stop in ten or fifteen feet; that when going six or seven miles an hour he could stop in from six to eight feet; that when he got to the corner of Crawford and Grand avenues he was going about four or five miles an hour and was going at that rate when he started to cross; that when he was hit he was going about five or six miles an hour; that when he first saw the automobile which hit him it was about fifty-five to sixty feet away and he was opposite the corner by the bill board.

On further cross-examination, through an interpreter, when asked why he did not put on the brakes to stop his motorcycle when he saw the automobile fifty-five or sixty feet away, he answered, "It was too late to put on the brakes then, because if I put on the brakes he was going so fast he would kill me on the spot, and I wanted to turn off on the side a little to give him a chance to pass me." He further testified that when he entered Crawford avenue he looked south first; that after looking south he then, when the automobile that hit him was about sixty-five feet away, looked north. Then asked further whether it was then too late for him to stop in order to avoid

six or seven feet over on the east side of the mountain and landed like an round [illegible] [illegible] [illegible]. At his time of the collision he had an Irishman Langdon and I motion chase. After being struck he was taken in an ambulance to St. Amy's Hospital at about one [illegible] afternoon; diagnosis his leg was amputated. He [illegible] [illegible], then his mobile in question gave no warning of any kind.

In cross-examination he testified that on Tuesday he was told that motorcycle was too in leaving cities on hour; that it was a second hand machine which he bought for [illegible]; that when going ten miles an hour he could see it for [illegible] feet; that were going six or seven miles an hour he could stop in six to eight feet; that when he put in the clutch of transmission and [illegible] engine he was going about 35 or 40 miles an hour and was going at that rate when he started to crank; that when he was hit he was going about five or six miles an hour; that even he first saw the automobile which hit him it was about fifty-five to sixty feet away and he was opposite the corner by the bill board.

In further cross-examination, [illegible] an interpreter, when asked why he did not put on the brakes to stop his motorcycle when he saw the automobile fifty-five or sixty feet away, he answered, "It was too late to put on the brakes then, because if I put on the brakes he was going so fast he would fall on the road, and I wanted to turn off on the side a little to give him a chance to pass me." In further testifying that when he saturday [illegible] [illegible] [illegible] [illegible] after looking south he saw, when the automobile that hit him was about sixty-five feet away, looked north. Then made turning when he was [illegible] [illegible] [illegible] [illegible] [illegible]

getting on the southbound track on Crawford he answered, "It was too late then he was farther than I was; I thought I was going to pass across first, before he would." He also stated that he dodged to the south when he saw he was going to get hit; that he did so to give the automobile more room in which to miss him; that he was about getting through when his machine was hit in the rear; that, when he started to dodge, the automobile was about ten or twelve feet away. As to exactly where he was and just where his motorcycle was struck, he testifies that the automobile was running south in the southbound car track on Crawford avenue and that the front wheel of his motorcycle was beyond the west track on Crawford avenue, his rear wheel being on the track. He says he was thrown about six or seven feet west from the automobile and skidded along on his elbows and wrists from five to seven feet; that his leg was broken before he struck the pavement. He also further testified that he was trying to, and probably did, increase his speed, so as to avoid being struck. On redirect examination the plaintiff testified that the automobile that collided with him was traveling from twenty-five to thirty miles an hour.

One Hanket, a witness for the plaintiff, a farmer about twenty-five years of age, whose evidence was introduced by means of a deposition, stated that he saw the motorcycle go west on Grand avenue at the rate of about five miles per hour; that his attention was called to it because it was unusual to see a motorcycle going five miles an hour on Grand avenue; that at the time of the collision it was going at approximately five miles an hour; that it was then north of the center of Grand avenue; that immediately after the collision the motorcycle was lying close to the southwest corner at Grand avenue and Crawford avenue, the automobile being east of

it; that he saw the plaintiff's "foot was caught in the front wheel of the automobile, and he was torn from his motorcycle and dragged along southward with the automobile for a few feet"; that he did not know at what speed the automobile was traveling.

On cross-examination, he stated that he was walking on the south side of Grand avenue going northwest and was back of the motorcycle; that it was the slowness with which it was driven that attracted his attention; that he probably walked ten feet from the time the motorcycle was abreast of him until the collision which took place north of the center line of Grand avenue. He further says that just before the collision the motorcycle changed its direction, turning slightly to the south, going about ten feet from the original direction, northwest; also, that the automobile caught the motorcycle at the front of the wheel and that the plaintiff was thrown over the hood, across the front of the limousine on to the pavement; that it seemed as though he shot directly from the left front wheel of the limousine.

Hanket says he was 130 feet (east) from the nearest curb of Crawford avenue when the collision occurred; that he, himself, traveled ten feet from the time the motorcycle came abreast of him and until the collision occurred; that he was walking about two miles an hour; that during that time the motorcycle traveled about 160 feet; thathe does not know exactly how fast he was going; that he was just about moving; that he might have traveled twenty feet; that the rate of speed at which the motorcycle was going was impressed on his mind more than anything else.

Five occurrence witnesses, Skwarek, Brooks, Huber,

it; then he saw the pickpocket's foot sought in the front wheel of the motorbike, and by a jump from his motorcycle was trapped along sudden with the motorbike the a few feet; then he did not know at what speed the motorbike was travelling.

On cross-examination, he stated that he was waiting on the world cup of 1966 wheel lying terrified but the back of the motorcycle; that it was the element which it was driven that attracted his attention; that he probably walked the feet from the time the motorcycle was driven of the motorbike the collision which took place near of the radio line of Grand avenue. He further says that just before the collision the motorcycle changed its direction, turning slightly to the south, from about the last time the original direction, moreover; also, that the pickpocket caught the motorcycle at the front of the wheel and that the pickpocket was thrown over the hood, across the front of the lightbulbs at to the pavement; they it seemed as though he came directly from the left front wheel of the lightbulbs.

Donald says he was 100 feet (sic) from the crossed path of Gladstone when the collision occurred; that he, himself, travelled the feet from the time the motorcycle came wheeled of his and until the collision occurred; that he was walking about the Eaton on foot; that during that time he motorcycle lamplit what he felt; during this he had exactly not fled to the right; that it was just then which he might have travelled backwards feet; that the path of speed in which the motorcycle was going was improved on the side were the pickpocket was.

Thomas and Libal, testified for the defendant.

The evidence of Skwarek is that he was in the second automobile from the front of the funeral procession, sitting in the front seat on the left hand side; that when he first saw the motorcycle it was about fifty feet or so from the east curb line of Crawford avenue on Grand avenue; that when the automobile in which he was, was "about even with the north curb line at the sidewalk", meaning the north curb line of Grand avenue, that the motorcycle was then going about 25 miles an hour, which speed was increased as it went on; that the automobile in which he was, was from 25 to 30 feet north of the automobile ahead of it; that when the automobile in which he was riding had crossed one of the car tracks in Grand avenue, the collision occurred; that the plaintiff did not ride straight but tried to change when he was just going to the car tracks on Grand avenue to cross Crawford and turned at an angle toward the south; that the driver of the automobile turned to the west, put the brakes on and stopped the automobile in about five or six feet; that the automobile was traveling slowly when he, the witness, first saw the motorcycle; that it was going from 8 to 10 miles an hour; that the collision occurred on the left hand side in front of the car; that the plaintiff was knocked off the motorcycle over towards the west curb of Crawford avenue; that when it was over he, the plaintiff, was lying near the southwest corner of the intersection about 10 feet from the right front wheel of the automobile; that just before the accident, when about 8 feet from the automobile the plaintiff had a satchel in his right hand which he threw away. On cross-examination he stated that he was not sitting with the driver but behind him on the left hand side of the car; that there was somebody sitting with the driver; that at the time he

Thomas was killed, supplied the information.

The evidence of Stewart is that he was in the driver's seat of the motorcycle from the time of the fatal accident, sitting in the left rear seat on the left hand side; that when he first saw the motorcycle it was about fifty feet or so from the east curb line of Crawford Avenue on Bond Avenue; that when the automobile in which he was, was "about even with the north curb line of the alleyway", meaning the north curb line of Bond Avenue, that the motorcycle was then going about 25 miles an hour, which speed was increased by it went on; that the automobile in which he was, was from 25 to 30 feet north of the automobile ahead of it; that when the motorcycle in which he was riding had reached one of the car tracks in Bond Avenue, the collision occurred; that the plaintiff had time to jump out of the car and throw himself on the ground before the car had gone 15 or 20 feet; that the driver of the automobile turned to the left, and the driver of the motorcycle in closed fire or six feet; that the automobile was travelling slowly when he, the witness, first saw the motorcycle; that it was going from 8 to 10 miles an hour; that the collision occurred on the left hand side in front of the car; therefore plaintiff was hurled off the motorcycle over towards the west curb of Crawford Avenue; that when it was over he, the plaintiff, was lying near the southwest corner of the intersection about 10 feet from the right front wheel of the automobile; that just before the accident, when about 8 feet from the automobile the plaintiff had a letter, he has stated that he did not see any. In cross-examination he stated that he was not sitting with the driver but behind him on the left hand side of the car; that

first saw the motorcycle the front end of the automobile was about even with the north sidewalk at Grand avenue; that the point where the collision occurred was about at the intersection of the four street car tracks; that the distance from the sidewalk to the point where the collision occurred was about 25 feet; that the plaintiff traveled about 150 feet from the time he first saw him up to the time of the collision; that while the automobile was traveling 25 or 30 feet the motorcycle traveled 100 feet; that the automobile was going about ten miles an hour; that the automobile was going south on the west track and stayed in the car track until near the center when the driver turned it to the west; that the automobile was pointed in a southwesterly direction when it struck the motorcycle; that the automobile went about 4 or 5 feet before it came to a stop; that it slackened its speed before it struck; that at the time it struck the motorcycle it was going between 6 and 7 miles an hour; that the plaintiff was going about 30 miles an hour at the time of the collision.

The witness Brooks testified to the effect that at the time in question he was standing on the southeast corner of the intersection; that he first saw the plaintiff about 300 feet east of Crawford avenue; that as he approached the intersection the motorcycle was going about 20 or 25 miles an hour, being driven between the westbound track and the north curb on Grand avenue; that when the plaintiff reached Crawford avenue he turned slightly to the south of the westbound track on Grand avenue; that when the motorcycle was about 50 feet east of the curb on Crawford avenue the automobile was about on the north curb line of Grand avenue; that the collision took place about the center of the intersection; that the automobile was traveling between the track and the curb; that the collision occurred between the

first day the outcrops in the Tyrol and at the automobile was about seven miles from Innsbruck it began snowing and the point where the nodules occurred was only 2 at the intersection of the two roads leading East to Innsbruck from the airfield to the point where the nodules occurred was about 2[illegible] feet and the nodules occurred about 300 feet from the line he first saw them on in the time of the nodules; but while the automobile was travelling 22 or 23 feet the outcrops terminated 300 feet; this is substantiate was going about ten miles an hour; that the automobile was going much so the most lower was edged by the new lorry will have the results this crisis making it in the very time the automobile was going in a northwesterly direction when it caused the occurrence; that the nodules were about a or 2 feet below it from so a stage; that it alternated its speed before it already then at the time it attack the nodules it was going towards 2 and 2 miles an hour; that the chemical was going above 30 miles an hour at the time of the nodules.

The witness stated subjected to cross-examination that he came to visited he the training on the mountain slopes of the Schwarzwalder; that he first saw the nodules about the end of October; that he knew nothing about the nature of the nodules; it was going about 20 or 25 miles an hour, being taken between the mountains from the Lake Constance; he noticed that when the nodules were in the mountain; training Commission; the typical activity in the middle of the mountains; that as soon crossing that with the nodules and the 2 or 3 feet head of the rock in Tirolian where the nodules was also in the north-east-like of Tirol; however that the nodules were also in the north-east of the Innsbruck; that the nodules were travelling towards

bumper and the front axle of the automobile on the left hand side with the motorcycle. On cross-examination he stated that at the time he was standing on the curb at Crawford avenue about 15 feet south of Grand avenue; that the collision occurred slightly west of the center of the intersection of the two avenues; that at the time of the collision the automobile was headed about straight south; that he did not notice there was a swerve to the west before striking the motorcycle. The witness was shown a typewritten paper which he had filled out, in which he had written, in answer to the question, "About how many miles an hour?" the answer "15 miles", meaning the automobile.

The evidence of the witness Huber, an employee of a storage company, is to the effect that he was in the same car with Skwarek; that Skwarek was sitting in front and he was sitting in the rear seat; that there was one automobile 20 to 30 feet ahead of the one he was in; that when he neared the intersection he heard the horn of the automobile ahead; that at that time the automobile he was in was about 15 to 20 feet from Grand avenue; that he looked out and saw the motorcycle coming; that the motorcycle was about 20 to 50 feet east of the curb line of Crawford avenue; that at that time the front wheel of the automobile had reached the first car track; that the motorcycle was going from 20 to 25 miles an hour and the automobile before they got to the street car track about the same and when the horn blew it was between 6 and 10 miles an hour; that he leaned out but could not see exactly what happened when the collision occurred; that when the motorcycle got within 6 to 10 feet of the automobile the automobile made a turn to the right and was just about coming to a stop when the collision took place; that the automobile went on about four or five feet after the col-

Bumper and the front mole of the automobile on the left hand side of the motorcycle. In cross-examination he stated that at the time he was standing on the road at Trowbridge about 20 feet north of cross roads; that the collision occurred directly west of the center of the intersection of the two roads; that at the time of the collision the motorcycle was headed about straight north; that he did not notice that the a square in the back before reaching the motorcycle. He said he was on the road before reaching the motorcycle; that he did not notice that the motorcycle was at the time of the collision the motorcycle was where he had stated when the collision occurred.

The evidence of the defendant Bodner, an employee of a storage company, is to the effect that he was in his home at Trowbridge; that Cameron was staying in town and he was staying in the same house; that Cameron was accompanied by a Ford coupe of his own; that when he reached the intersection he heard the horn of the automobile ahead; that at that time the automobile he was in was about 15 to 20 feet from Cameron; that he looked out and saw the motorcycle coming; that the motorcycle was about 50 to 60 feet east of the north line of Stanford avenue; that at that time the front wheel of the automobile had reached the first car track; that the motorcycle was going from 40 to 45 miles an hour; the automobile before they got to the street car track slowed down and then the motorcycle was going from 40 to 45 miles an hour; that he heard one but could not see exactly what happened when the collision occurred; that when the motorcycle got within 8 to 10 feet of the automobile the automobile made a turn to the right and was just about coming to a stop when the collision took place; that the motorcycle went on about four or five feet after the collision

lision; that when he got out he saw the motorcycle all twisted and bent sticking between the front wheel and the front bumper. On cross examination he testified that before the horn sounded it was going 20 to 25 miles an hour; that when the horn sounded it began to slow down; that that was when they were going into Grand avenue; that when the front wheels of the automobile had just about reached the street car tracks the motorcycle was between 10 and 20 feet east of the automobile; that the collision occurred in the center of the intersection of the four tracks; that when the automobile got to the north line of Grand avenue going south it was then going from 8 to 10 miles an hour; that at the time of the collision the car was almost stopped; that there were three people beside the driver sitting in front of them; that there were six passengers beside the driver in the automobile. The evidence of Thomas, a wood worker, who was sitting in the rear seat on the right hand side of the automobile in question, is to the effect that when the automobile got to the north curb of Grand avenue the motorcycle was about 25 to 30 feet east of the Crawford avenue crossing "in the middle of the track between the two rails"; that as the plaintiff came on he increased his speed; that he did not come straight towards the automobile but when he was about 15 feet away turned to the south and the driver of the automobile decreased the speed of his car; that at the time the automobile started across Grand avenue it was going from 8 to 10 miles an hour; that the automobile did not keep on going straight but curved west to the right; that the automobile went about 8 feet after the collision; that the collision was between the motorcycle and the left front wheel and the bumper of the automobile; that when it was over the motorcycle was under the front of the automobile

between the axle and the bumper.

On cross-examination he stated that two men sat in the seat with him at his left and three men in the seat in front of him and the driver in the front seat alone; that he heard the whistle of the first automobile blowing; that he watched the speedometer up to the time the whistle blew; that there was a partition between the driver and the others in the automobile but that did not prevent him from seeing the speedometer; that when the whistle blew on the first automobile his automobile was about 10 or 12 feet north of Grand avenue; that the plaintiff turned first south and turned north so that when he was struck he was headed in a northwesterly direction; that the collision occurred in the middle of the track.

The evidence of the witness Libal is to the effect that he is the president of the defendant company, and drove the automobile in question; that the procession consisted of four limousines, a hearse and about six open cars; that as he arrived at the north curb of Grand avenue he was driving about 6 to 8 miles an hour; that it was then he first saw the plaintiff 35 to 50 feet east of the curb line on Crawford avenue traveling in about the center of the west bound car track and going at the rate of about 30 miles an hour; that, at the time, the plaintiff had a "grip" either on the handlebar or in his hand; that he varied somewhat from a straight line, about 2 or 3 feet each way; that the first automobile was already at the south line of the eastbound car tracks on Grand avenue and he was about 15 feet back; that when his automobile arrived at the first track on Grand avenue, the plaintiff was abo t 15 feet from him; that he, the witness, then, at that time, put on the brakes and began to

between the axle and the bumper.

On cross-examination he stated that he was not in the car at the time of the injury and there was in the car some in front of him and the driver of the truck was alone; that he heard the sounds of the three automobile horns; that he noticed the approaching car in the same the middle lane; that there was a partition between the driver and the others in the automobile but that he did not prevent him from seeing the speedometer; that when the automobile blew on the first automobile his automobile was about 10 or 12 feet north of train crossing; that the plaintiff turned first north and turned north in that when he was struck he was headed in a northwesterly direction; that the collision occurred in the middle of the track.

The evidence of the plaintiff's right is as the driver that he is the president of the defendant company, and from the testimony in question; that the conductor testified at that time, a horse and buggy did open road; that he arrived at the north end of Grand Avenue he saw train about 6 to 8 miles an hour; that it was down hill; that he saw the plaintiff 30 to 40 feet east of the north line on Grand Avenue travelling in about the center of the north bound car track and going at the rate of about 30 miles an hour; that, at the time, the plaintiff had a "grip" either on the handlebar or in his hand; that he veered towards from a straight line, where 2 or 3 feet such way; that the first automobile was already at the north line of the westbound car track on Grand Avenue and he was about 25 feet back; that when his automobile arrived at the first track on Grand Avenue, the plaintiff was six 25 feet from him; that he, the witness, then, as that time, on the brakes and turned to the left; that the plaintiff was 10 or 12 feet from the automobile when he was struck; that the plaintiff turned first north and turned north in that when he was struck he was headed in a northwesterly direction; that the collision occurred in the middle of the track.

slow up; that the plaintiff turned to the left when he got close to him and he turned his automobile to the right. His testimony is as follows: "Just as soon as I could put the brakes on I did, because I seen we were going to hit when I seen him turn to the left." He further testified that the collision took place between the motor cycle and the left front wheel and bumper; that the plaintiff was thrown about 8 feet "off to the right of me in front of the machine," having been thrown clear across the machine over on to the right side.

On cross-examination he stated that it was practically a new Cunningham automobile which he was driving and that he was himself a little under 19 years of age; that it was a left hand drive and that there was a man sitting with him on the front seat; that the automobile normally accommodated six passengers; that at the time in question he used the emergency and the foot brake both; that they were in good condition and would stop a car within 4 or 5 feet; that he could stop it within 10 feet when going 10 miles an hour; that the motorcycle made a great deal of noise as it traveled and that it seemed to him "he was coming pretty fast."; that at the time the front end of the automobile reached the street car track in Grand avenue the plaintiff was then about 15 feet east of the curb line of Crawford avenue; that the collision occurred at a point a little to the west of the center of the intersection; that up to the time when the motorcycle was within 5 or 10 feet of the place of the collision he drove the automobile in the street car track; that he then turned to the west and got both the front wheels out of the street car track; that it seemed as though the plaintiff increased his speed when within 20 feet of the automobile; that he seemed to have a small grip in his hand or on the handlebar and as though the

slow up; that the plaintiff turned to the left when he got close to him and he turned his automobile to the right. He testified to the following: "Just as soon as I could get the lamps on I did. Because I knew he was going to hit me, I was on the left." Mr Dorsey testified that the collision took place between the motor cycle and the left front wheel and further; that the plaintiff had turned back to the "off" or the right or to the front of the machine, having been blown clear before the collision over on to the right side.

On cross-examination he stated that it was practically a dry Tuesday afternoon which he was driving and that he was himself a little under 20 years of age; that it was a left hand drive and that there was a man sitting with him on the front seat; that the automobile normally accommodated six passengers; that at the time in question he used the emergency and the foot brake both; that they were in good condition and he did stop a car within 4 or 5 feet; that he thought he was within 30 feet when going 12 miles an hour; that the motorcycle made a great deal of noise as it traveled and that it seemed to him "the was making pretty fast."; that at the time the front end of the automobile reached the plaintiff's car there was the plaintiff was from eight 10 feet east of the curb line of Crawford avenue; that the collision occurred at a point a little to the west of the center of the intersection; that up to the time the motorcycle was within 8 or 10 feet of the place of the collision he saw the automobile in the extreme car track; that he then turned to the west and got both the front wheels off the street car track; that it seemed as though the plaintiff increased his speed when within 30 feet of the automobile; that he seemed to have a small pole in his hand [illegible]

plaintiff was trying to balance it as he was coming along; that the automobile struck the front wheel of the motorcycle and that at that time the automobile was facing about southwest; that the motorcycle came in contact with the bumper on the inside it was not the left wheel of his car which collided with the motorcycle; that the bumper is a straight line excepting at the ends where it turns in towards the tires; that the front end of the car had not passed the south track of Grand avenue when it came to a stop.

The plaintiff being recalled in rebuttal testified that at the time in question he had neither handbag or package with him.

On June 16, 1921, after being instructed by the trial judge, the jury brought in a verdict in favor of the plaintiff in the sum of $4,000.00. Judgment was entered thereon.

The situation was a complex one, and the plaintiff, who testified, partly in English and partly through an interpreter, wasHandicapped somewhat in his ability to present a clear statement of the facts. Such a collision and the immediately preceding important movements of motorcycle and automobile transpire with such speed that itis difficult even for the most alert and observing minds to visualize and remember all the essential details so as to be able thereafter to portray in exact words just what took place and especially when called as witnesses after the lapse of considerable time, as in this case, over five and a half years. It is the law, however, that in such a case as this, the plaintiff must show affirmatively by sufficient evidence that he was in the exercise of ordinary care and that the defendant

distrait. Our trying to balance it on his own coming alongside the automobile which Mr. Ford owned at the moment, and that at this time the automobile was facing about northwesterly from the intersection where it crossed with the bridge on the railway. It was not the left wheel of his car which collided with the railway, but the bumper is a straight line and coupling at the rear where it turns in towards the tires; that the front end of the car had not passed the north track of Grand Avenue when it came to a stop.

The plaintiff being required by counsel hereinafter that at the time it crossed the railroad heading to Pendergast Park.

On June 19, 1941, after being interrupted by the trial judge, the jury brought in a verdict in favor of the plaintiff in the sum of $4,000.00. Judgment was entered thereon.

The elsewhere is a simple one, and the plaintiff, the initiator, policy - neither nor merely through an intermediary, mechanically because it is easily to proceed a clear efficiency of the right. That a vehicle and the low mobility preceding increment movements of motorcycle and automobile brought with such speed that its efficient area for the most right and observing which is although and remember all the essential details to be in by white shrine after to perhaps in court verge just what that alive and personally some relies to attorneys with the cause of consistency line, as in this case, with five and a half years. It is in the law, however, that be much a come to end, the plaintiff left was differentiately to multiplied wrongness that on

was not. His undertaking is to make out a case by evidence and his lack of ability accurately to describe and make himself, clearly understood, give rise to no presumptions in his favor.

On the face of the record, the dominant question seems to be, was the plaintiff, at the time, in the exercise of ordinary care? He says he looked south and looked north and when looking north he saw the automobile 50 to 55 feet away from him, and, further, that it was about opposite the middle of the power house, which, according to measurements that were introduced, would place the automobile 130 feet north of the north line of Grand avenue as it crosses Crawford avenue. It may be that, if, when the plaintiff, going 6 or 7 miles an hour, arrived at the east line of Crawford avenue, the automobile was either 50 to 55 feet north of Grand avenue or 135 feet north of Grand avenue - the plaintiff testified to both distances - he would be justified in going on and concluding that with ordinary care he could safely pass through the intersection ahead of the automobile. He stated, however, that as he approached Crawford avenue the first automobile had already crossed Grand avenue, and the evidence shows that that automobile, according to the testimony of Skwarek, Brooks, Suber, Thomas and Libal, was not over, at the most, 30 feet ahead of the automobile with which the plaintiff collided. The evidence, quite overwhelmingly, suggests that when the plaintiff arrived at the east line of Crawford avenue the automobile in question was much nearer than the plaintiff intimated. Hanket, the plaintiff's only occurrence witness, does not state where the automobile was at that time; that may be owing, however, to the fact that Hanket was, at the time of the col-

lision, 130 feet east of the east curb line of Crawford avenue. Thomas says that when the automobile arrived at the north curb of Grand avenue the plaintiff was 25 to 30 feet east of Crawford avenue. Libal says that, at that time, the plaintiff was 35 to 50 feet east of the curb line of Crawford avenue. Brooks says that the automobile was about on the north curb line of Grand avenue when the motorcycle was about 50 feet east of the curb line of Crawford avenue. Huber says that when the automobile neared the intersection and was about 20 feet from the north line of Grand avenue or from the track in Grand avenue, the motorcycle was from 20 to 50 feet east of the curb line of Crawford avenue. So, it would seem that the evidence, quite overwhelmingly, is to the effect that the automobile reached the intersection before the plaintiff. Further, the plaintiff states that the automobile in question was traveling from 25 to 30 miles and hour and that he, himself, was going from 5 to 6 miles an hour. Hanket does not give the speed of the automobile but says that the plaintiff was traveling at about 5 miles and hour; being, however, 130 feet, as he says, east of Crawford avenue at the time he made his observation, his judgment as to the speed of the motorcycle would not be the best. Thomas says the automobile was going from 5 to 10 miles an hour. Libal, that the automobile was going from 6 to 8 miles an hour and that the motorcycle was "coming pretty fast." Skwarek says the automobile was going from 8 to 10 miles an hour and that the motorcycle was going about 45 miles an hour, and that as the plaintiff went on "he gave her more speed." Brooks stated that the automobile was going about 15 miles an hour and that the motorcycle was going about 30 to 45 miles an hour. From the foregoing it appears that the evi-

[illegible] the back end of the road such line of [illegible] avenue. Witness says that when the automobile arrived at the motor road of Grand Avenue the driverlit was 25 to 30 feet east of Broadway avenue. Lihel says that, at that time, the driverlit was 30 to 35 feet east of the back line of Broadway avenue. Witness says that the automobile was ahead of the driverlit at about minute when the collision was already two feet east of the back line of Broadway avenue. Witness says that when the automobile reached the intersection the car was about 25 feet from the north line of Grand avenue or from the street in Grand avenue. The automobile was from 20 to 30 feet east of the main line of Broadway avenue. He, it would seem from the evidence, quite conscientiously, is of the effect that the automobile reached the intersection before the driverlit. Further, the driverlit avers that the automobile in question was traveling from 20 to 30 miles and over and that he, himself, was going from 8 to 9 miles an hour. Lihel does not give the speed of the automobile but says that the driverlit was traveling at about 8 miles and over; being, however, 100 feet, or so says, east of Broadway avenue at the time he made his observation. His judgment as to the speed of the motorcycle was, of course, the best. Witness says the automobile was going from 8 to 10 miles an hour. Lihel, that the automobile was going from 6 to 8 miles an hour and that the motorcycle was "moving pretty fast." Witness says the automobile was going from 8 to 12 miles an hour and that the motorcycle was going about 18 miles an hour, and that at the driverlit went on the grade the more speed." Brooks stated that the automobile was going about 12 miles an hour and that the motorcycle was going about 20 to

dence is quite strong that the motorcycle was going at a greater rate of speed than the automobile.

Inasmuch, therefore, as the evidence very strongly goes to show that the automobile, which was traveling at a reasonable rate of speed, reached the intersection first, and that the plaintiff was going at a greater rate of speed than the automobile, it then became the duty of the plaintiff in the exercise of ordinary care to recognize the "superior right" of the automobile and make every reasonable effort to stop his motorcycle in time to prevent a collision. Knickerbocker Ice Co. v. Bendix, 206 Ill. 362. In the latter case a conductor while collecting fares on a street car was run into at a street intersection by an ice wagon. The conductor brought suit and recovered a verdict and judgment, and, upon review in the Supreme Court, Mr. Justice Scott used the following language:

> "As the car approached the point where the line of travel it was following would intersect the line of travel the appellant's team was following, it was traveling at a reasonable rate of speed, as shown by the evidence. Traveling at that rate of speed it reached the intersection first. There was nothing to prevent appellant's driver seeing the car and perceiving that it would reach the point of intersection first. Under these circumstances it was the duty of the driver of the team, and not the duty of those in charge of the car, to stop, and the failure of the driver to stop his team under the circumstances is the negligence of appellant."

And further:-

> "The evidence tended to show that immediately preceding the collision the team of the appellant was traveling at a higher rate of speed than was the car. Those in charge of the car had the right, however, to assume that those in charge of the team would recognize the superior right of the car and stop the team before it ran into the car."

The situation of fact in the Knickerbocker Ice Co.

case and in the instant case is unlike that in Campbell v. Chicago City Ry. Co., 214 Ill. App. 344, where we said, "When two men are driving on lines that visibly intersect, the general obligation of ordinary care becomes for each a definite duty, and if, as they approach, their contiguity and mutual movements suggest a probable or even a possible collision, neither is entitled to act on the assumption that the other will give way."

In the instant case, the evidence, as we have analyzed it, goes to show that the plaintiff must have known that the automobile would reach the point of intersection first; and, that being true, the principle announced in the Knickerbocker Ice Co. case applies, and the driver of the automobile had the right to assume that the plaintiff would recognize the superior right of the automobile and stop his motorcycle in time to prevent a collision.

Further, it is significant, though not controlling, that the plaintiff testified that when he started to dodge or swerve, the automobile was 10 or 12 feet away. Of course, if he were going at the rate of 6 or 7 miles an hour and could stop his machine when going at that rate within 6 or 8 feet,- to both of which facts he testified - with ordinary care he could have prevented the collision that took place.

After analyzing and considering very carefully all the evidence and recognizing to the full the principle, that the verdict of a jury is not lightly to be disturbed, we are impelled to the conclusion that the judgment here is against the manifest weight of the evidence, and that the evidence actually shows that the plaintiff was guilty of such contributory negligence as to preclude his recovery. The judgment

one was in the instant case is making that in Dunphy v. Ontario Film Co., 24 O.L.R. 494, 496, where we read, "Some too much are driving on lines that vitally interest, the general obligation of contract once becomes for each a definite duty, and if, on any occasion, their morbidity and mutual movements suggest a problem or even a possible obligation, neither is entitled to act on the assumption that the other will give way."

In the instant case, the evidence, as we have analyzed it, goes to show that the plaintiff was into here that the automobile would reach the point of intersection first; and, that being true, the defendants succeeded in the contributory negligence has to, some degree, and the duties of the automobile had the right to assume that the plaintiff would recognize the superior right of the automobile and stay his motorcycle in time to prevent a collision.

Further, it is significant, though not conclusive, that the plaintiff testified that she was in started to stop or reverse, the automobile was 10 or 12 feet away. Of course, if he were going at the rate of 6 or 7 miles an hour and spring very inconsiderable time only at most was about 1 or 2 feet, to both of which facts he testified - with evidently some in mind have prevented the collision that took place.

After analyzing and considering very carefully all the evidence and recognizing to the full the authority, that the verdict of a jury is not lightly to be disturbed, we are impelled to the conclusion that the judgment here is against the manifest weight of the evidence, and that the evidence clearly shows that the plaintiff was guilty of such contributory negligence as to disentitle her to recover. The judgment

of the Superior Court, therefore, will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that the plaintiff was guilty of contributory negligence.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

341 - 27299

FRANK SARRIS,

Appellee,

v.

JOHN CHAMAS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 30, 1920, the plaintiff, Frank Sarris, brought suit in the Municipal Court of Chicago for $137.40, for money loaned to the defendant, John Chamas, and recovered judgement for that amount.

The statement of claim alleges seven items of cash, loaned to the defendant, and one credit for exchange merchandise, leaving a balance due the plaintiff of $137.40. It is also alleged in the statement of claim that on May 11, 1920, the defendant acknowledged and promised to pay that indebtedness.

There was a trial before the court without a jury. Six witnesses were called, three for the plaintiff and three for the defendant. The plaintiff himself testified that he loaned the defendant various sums of money aggregating $137.40; that one of the items was $35.00 which was loaned on August 25, 1909; that he had a conversation with the defendant at the latter's place of business on July 7, 1920, at which time the defendant promised to pay him, the money he owed him, within a week; that, however, the defendant did not pay any of the sum due and still owes him, the plaintiff $137.40.

One Grilos testified for the plaintiff that he went with the plaintiff to the defendant's place of business in July, 1920, to get his shoes shined; that the plaintiff and the defendant were talking together and the plaintiff had a card in his hand; that he did not hear all the conversation but he heard the defendant say "I will be over Sunday and settle everything."

The defendant himself testified that he had had business dealings with the plaintiff in 1907; that he loaned money to the plaintiff and the plaintiff paid him back and then he, himself, borrowed from the plaintiff; that they never had an accounting between them; that he owed the plaintiff $90.00 when he stopped doing business with him; that the plaintiff never asked him for any money since 1909; that the plaintiff was not in the defendant's place of business on July, 1920, along with Grilos; that he never said to the plaintiff "I will be over Sunday and pay you."; that he does not now owe the plaintiff anything.

One Hoffman, called for the defendant, testified that he never saw the plaintiff in the premises at 159 North Clark Street nor did he see Grilos in there at any time. Likewise one Coleman, called for the defendant, testified that he works at 159 North Clark street, and that he did not remember having seen the plaintiff and Grilos at 159 North Clark Street on July 7, 1920.

Under the circumstances we are not justified in overriding the judgment of the trial judge. The evidence is conflicting as to the tolling of the Statute of Limitations. The plaintiff testified, in order to avoid the application of the Statute of Limitations, that the defendant in 1920 promised to

The notice specified for the plaintiff that he would ask the plaintiff in the defendant's place of business in July, 1966, to get his phone number; that the plaintiff and the defendant were talking together and the plaintiff had a card in his hand; that he did not hear all the conversation but he heard the defendant say "I will be over tomorrow and sign for everything."

The defendant himself testified that he had had business dealings with the plaintiff in 1967; that he issued money to the plaintiff and the plaintiff paid him back and then he, himself, received from the plaintiff; that they never had or discussing between them; that he knew the plaintiff 1967. He stated that he signed being business with him; that the plaintiff was not walked him for any money since 1968; that the plaintiff was not in the defendant's place of business on July, 1966, along with Phillips; that he never said to the plaintiff "I will be over tomorrow and sign for you."; that he does not owe the plaintiff anything.

One Jeffrey, called for the defendant, testified that he never saw the plaintiff in the premises at 180 North Clark Street nor did he see Phillips in there on any time. Likewise one Dilmore, called for the defendant, testified that he works at 180 North Clark Street, and that he did not remember having seen the plaintiff and Phillips at 180 North Clark Street on July 7, 1966.

Under the circumstances we are not justified in overruling the judgment of the trial judge. The evidence is conflicting as to the holding of the Statute of Limitations. The plaintiff testified, in order to avoid the application of the

pay him what he owed him. On the other hand the defendant contradicts the statement of the plaintiff and the two witnesses called by the defendant testified that they did not see the plaintiff and Grilos in the store of the defendant on a certain date. In our judgment there was sufficient evidence to justify the trial judge in concluding that the defendant had made the promise as claimed by the plaintiff and that the Statute of Limitations, therefore, would not apply. Further, it is contended on behalf of the defendant that the trial judge erred in permitting the plaintiff to refer to a memorandum book in which several items had been written and then to testify as to the amount due. The record, however, as it appears before us does not show that any objection was made either to the use of the book or to the statement of the witness as to its contents, and under the circumstances no question may arise here as to the competency of the testimony of the plaintiff.

As to the statement of claim, it was not necessary for the plaintiff to state therein any particular date when the money was due from the defendant. It is sufficient merely to state that the defendant owed him $137.40 for money loaned. Of course, there was no obligation on the plaintiff to plead the Statute of Limitations. That is always a matter of affirmative defense.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

371 - 27329

IRVING I. COHEN,

Appellee,

v.

ADOLPH D. WEINER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Cohen, on June 20, 1921, brought suit in forcible detainer against the defendant, Weiner, for possession of the third apartment in the premises known as 432 St. James place, Chicago, and recovered a judgment. This appeal is therefrom.

The case was tried before the court without a jury. The evidence substantially shows the following:- That the defendant had been a tenant of the premises for about fifteen years; that on February 7, 1921, he was notified by letter that if he desired a new lease the rent would be $90.00 per month until September 30, 1921; that after that date the owner intended to occupy the premises for his own use; that "if satisfactory, Kindly communicate with me on or before the 28th day of February, 1921"; that on February 23, 1921, one of the joint owners of the property, by registered letter, which shows it was received on February 28, 1921 sent word to the defendant that his tenancy would terminate on April 30, 1921; that as he (Siegel) was going to occupy the entire building, he was unable to extend the lease; that on February 28, 1921, he, the defendant, wrote to Siegel, notifying him that he accepted the terms

contained in the letter of February 7, 1921, and signifying his willingness to sign a lease at a rental of $90.00 per month, until September 30, 1921, any time it might be submitted, and on April 30, 1921, sent by mail a check for $90.00 to Siegel, which the latter returned.

The evidence further shows that on March 14, 1921, Siegel and his wife (who then jointly owned the premises in question) leased the property, in writing, from May 1, 1921, to April 30, 1926, to Irving I. Cohen, the plaintiff, herein, and that it was provided that if the lessors, (Siegels) on May 1, 1921, were not able to deliver possession of all of the seven apartments (the eighth was expressly excluded) but was able to deliver five out of the seven, the lease should become binding, and the rent reduced according to a certain schedule, and paid directly to the lessors, the Siegels.

The evidence also shows that one Frankel, who signed the letter of February 7, 1921, has authority to act for the owners. He testified that he represented the Siegels in the original purchase of the property by them, also, that he saw the tenants, and wrote to the defendant the letter of February 7, 1921, representing, at least, Mrs. Siegel, one of the joint owners.

No brief has been filed in this court on behalf of the plaintiff.

The letter of the defendant of February 28, 1921, accepting the offer of Siegel contained in the letter of February 7, 1921, was mailed on the same date, as far as the record shows, as the letter of Siegel dated February 23, 1921, withdrawing the offer, was received by the defendant, that is Febru-

mentioned in the letter of February 7, 1933, was signifying his willingness to sign a lease at a rental of $90.00 per month, as of September 30, 1933, and then it might be with notice, and on April 30, 1933, would be such a lease for $80.00 in lieu, with the latter reserved.

The evidence further shows that on March 24, 1933, Lloyd and his wife (who then jointly owned the premises in question) leased the property, in writing, from May 1, 1933, to March 30, 1934, to Fredric L. Tuhey, for clothing, barber, and that it was provided that if the lessors, (Lloyd) on May 1, 1933, were not able to deliver possession of all of the seven apartments (two eighth was apparently occupied) but was able to deliver five of the seven, the lessee should become bound, and the rent reduced according to a certain schedule, and paid directly to the lessors, the Lloyds.

The evidence also shows that one Fowler, who signed the letter of February 7, 1933, had authority to act for the owners. He testified that he represented the Lloyds in the original negotiations of the property by them, also, that he was the lessee, and made to the letters the letter of February 7, 1933, representing, as lessee, Mrs. Lloyd, one of the joint owners.

It did not then lie with the original owner of the property.

The history of the defendant of February 24, 1933, mentioning the offer of Lloyd negotiated in the letter of February 7, 1933, was mailed on the same day, as far as the record shows, as the letter of Lloyd dated February 24, 1933, stating the offer, was received by the defendant, that is Tuhey

ary 28, 1921. Both letters were registered at the post office but neither envelope shows the hour of mailing.

The burden was on the plaintiff to show a right to possession - Fitzgerald v. Quinn, 165 Ill. 334 - and, in doing so, he was bound, in order to avoid the acceptance by the defendant of Siegel's offer before it was withdrawn, to show that the withdrawal ante-dated the acceptance. That he did not do. Where a landlord proffers an extension of a tenancy and before it is withdrawn it is accepted by the tenant, there is a meeting of minds and a binding contract arises.

We are of the opinion that the conduct of the parties resulted in the defendant being entitled to a tenancy of the apartment in question until October 1, 1921.

There is some contention that the plaintiff, Cohen, did not obtain any right to the premises in question as the result of his negotiations with the Siegels, and that, therefore, he had no authority to sue the defendant. No such evidence as to what flats were vacant so as to affect the rights of the Siegels and Cohen as between themselves on April 30, 1921, was introduced. Whether the lease, that is from the Siegels to the plaintiff, Cohen, was ineffective by reason of there being less than five apartments ready to be turned over on May 1, 1921, the evidence does not show; and whether after May 1, 1921, the plaintiff could have refused the obligations of the lease because of the breach of that condition is here immaterial. Without evidence of actual avoidance or cancellation the lease between the Siegels and the plaintiff must be considered as binding.

Being of the opinion that the defendant was rightfully in possession of the premises by reason of the extension

ary 28, 1981. Both sisters were employed at the pay station but neither receives above the base of salary.

The burden was on the plaintiff to show a right to recovery. Plaintiff v. Defendant, 180 III. 554 - and, in doing so, he was bound, in order to avoid the conclusion by the defendant of disqualifying effect upon his evidence, to show that the circumstances complained of were wilfulness. This he did not do. Where a landlord produces no evidence of a tenancy and before it is withdrawn it is accepted by the counsel, there is a complete of waste and a finding against defendant.

We are of the opinion that the conduct of the parties resulted in the defendant being entitled to a tenancy of the premises in question until March 3, 1981.

There is also problematic that the plaintiff, Jones, did not obtain any right to the premises in question as the result of his negotiations with the tenants, and that, therefore, he has no authority to use the reference. No such evidence as to such claim was tendered so as to affect the rights of the tenants and taken as between themselves on April 30, 1981, was introduced. Neither the issue, that is from the tenants to the plaintiff, Jones, was inefficiently by reason of there being less than five questions ready to be turned over on May 1, 1981, the evidence does not show; and another after May 3, 1981, the plaintiff could have refused the obligations of the lease because of the breach of that condition is deem immaterial. Without evidence of mutual consent or acquiesce the issue between the tenants and the plaintiff must be considered as binding.

Based of the opinion that the defendant was right-

of his tenancy, the judgment must be reversed.

REVERSED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

381 - 27339

STROME & JOHNSON,

Appellee,

v.

JAMES C. DAVIS, Director General of Railroads Federal Agent operating the Pennsylvania Railroad,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 18, 1921, the plaintiffs, Strome and Johnson, brought suit against the defendant, James C. Davis, Director General of Railroads, Federal Agent operating the Pennsylvania Railroad, for failure to deliver a certain quantity of wheat, and obtained judgment in the sum of $116.14 and costs. This appeal is from that judgment. The statement of claim is as follows:

> "That plaintiff loaded into car 44634, 81,000 pounds of wheat that said wheat so loaded was delivered to the defendant at his station at Warsaw, Ohio, on to wit, September 5, 1919, and accepted by him for transportation as a common carrier of grain; that the defendant in accepting the aforesaid car of wheat was a carrier engaged in interstate commerce and subject to the provisions of the Interstate Commerce Act, and the amendments thereto; that the defendant in consideration of the payment of certain freight charges agreed to transfer all of the said wheat and deliver all of the same to the consignee of his order; that the defendant in breach of his contract did not deliver at destination 58 bushels and 30 pounds of the said wheat, to the damage of the plaintiff in the sum of $116.14.
>
> The plaintiff hereby gives notice that he intends to avail himself of the provisions of that Illinois statute found in Section 116 of Chapter 114 of Hurd's Revised Statutes and hereto attaches affidavits required by such statute and gives notice to the defendant that he intends to introduce them in evidence of proof of the loading and unloading weight of the aforesaid car.
>
> That a claim in writing for this loss was filed

by the defendant within six months from the date of shipment and assigned claim number 71-336-484.

The plaintiff asks judgment for the above loss together with interest, costs, and a reasonable attorney's fee as provided by statute."

No affidavit of merits was filed on behalf of the defendant. No brief was filed on behalf of the plaintiff in this court.

The question arises whether the evidence which was offered justifies the judgment. No evidence was offered on behalf of the defendant.

Pursuant to Paragraph 199, Chapter 114, (page 2803, Cahill's Ill. Rev. Stat. 1921) concerning the receiving, transportation and delivery of grain, the plaintiff offered in evidence two affidavits, one showing that on September 5, 1919, one Strome weighed the grain loaded into car 44634 at Warren, Ohio, and that it amounted to 81,000 pounds of weight, and that it was not weighed by the railroad when it was shipped; that one Alexander on October 10, 1919, weighed the grain unloaded from car 44634, at the Pennsylvania Railroad elevator, Baltimore, State of Maryland, under the supervision of the Pennsylvania Railroad Co., and that it weighed 77490 pounds; that the railroad weighed the car of grain when it was delivered.

In the course of the trial counsel for the plaintiff obtained an order on the defendant that the latter produce the records of the unloading weight of car 44634 at Baltimore on October 10, 1919. Counsel for the defendant refused to comply with that order and the court then permitted counsel for the plaintiff to offer other evidence. Counsel for the plaintiff then offered a duplicate

weight certificate to show what the weight was at Baltimore. Counsel for the plaintiff testified to the duplicate certificate; that he had seen the original document in his office; that the duplicate certificate was made by one of the clerks in the office of the Baltimore Chamber of Commerce; that he, the witness, received it by mail from Baltimore, Maryland. It was objected to on behalf of counsel for the defendant and the objection sustained.

The plaintiff also offered in evidence, without objection, on behalf of the defendant, a Baltimore market report for Saturday, October 11, 1919, showing the market price of wheat such as that which was shipped to be $2.33 3/4 per bushel.

Counsel for the plaintiff when asked by the court what the market price was, stated it to be $2.34 a bushel, and that as the difference between the amount the wheat weighed in Baltimore and what it weighed in Ohio when originally shipped, was 38 bushel and 30 pounds, it made the plaintiff's damages, figured at $2.34, the total sum of $118.14.

It is contended by counsel for the defendant that the affidavit of Alexander shows that the Pennsylvania Railroad Company "did weigh the aforesaid car of grain when it was delivered" and that, therefore, the statute does not apply, as the statute expressly says, "and in case of the neglect or refusal of any such corporation, upon the delivery by it of any grain, to weigh the same, the sworn statement of the person to whom the same was delivered, or his agent having personal knowledge of the weight thereof, shall be taken as <u>prima facie</u> evidence of the amount delivered," etc. We think that contention is sound, and it follows that without

the affidavit in question, there is no evidence of the weight of the contents of the car when it was delivered at Baltimore, and it is, therefore, impossible to determine whether or not the plaintiff suffered any loss.

As to the contention that the Statute, above referred to is unconstitutional, that involves a subject concerning which we have no jurisdiction.

It is further contended by counsel for the defendant that the plaintiff is not entitled to recover owing to the fact that the transaction in question was one of interstate commerce. There is no doubt but that the shipment in question was not intrastate but interstate, being from a point in Ohio to a point in Maryland.

In Shellabarger Elev. Co. v. I.C. R.R. Co., 278 Ill. 333, where certain interstate shipments were considered the court said, "This cause of action is not on the bills of lading, but on the failure of the appellant to perform its duty to safely carry and deliver the grain. It is not under Carmack amendment, which refers only to the bills of lading. The provisions of the Carmack amendment do not interfere with the right of appellee to recover." Such being the law we are of the opinion that the court had jurisdiction.

Under the circumstances, however, the plaintiff herein having failed to make out its case, the judgment must be reversed.

REVERSED.

THOMSON P.J. AND O'CONNOR J. CONCUR.

Ohio to a point in Maryland.

105 - 27937

IN RE ESTATE OF GEORGE W. SCHULTZ, deceased. NORTHERN TRUST COMPANY, as administrator of the estate of GEORGE W. SCHULTZ, deceased, Appellee, vs. CLARKE W. SCHULTZ, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

22 I \ 626 4

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court reversing and setting aside the order of the Probate Court admitting the will of George W. Schultz, deceased, to probate, and refusing to probate the document offered as such.

The will was signed about ten o'clock in the evening and the testator was within an hour thereafter removed to an hospital for a surgical operation of a dangerous character, and it was in contemplation of that necessity and a possibly fatal result that the will was drawn and executed. The making of the will was suggested by the subscribing witness Brooks, a friend and neighbor, and he drew the same after questioning the testator respecting the disposition he wished to make of his property, after which he and Dr. Bernard, the attending physician, witnessed it. The testator was in much pain during the day, and in the forenoon had fallen in the hallway and was not on his feet again until after the operation, which was apparently successful. Without rehearsing the incidents of the day in detail it is sufficient to say that we find nothing in them which justifies the order refusing to admit the will to probate, if the testimony of the subscribing witnesses was

IN RE ESTATE OF GEORGE W. SCHULTZ,
deceased.

CLARENCE T. SCHULTZ,
Appellant.

vs.

GEORGE W. SCHULTZ, deceased,
Appellee.

CIRCUIT COURT OF
COOK COUNTY.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE DUNNE
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court reversing and setting aside the order of the Probate Court admitting the will of George W. Schultz, deceased, to probate, and refusing to probate the document offered as such.

The will was signed about ten o'clock in the evening and the testator was within an hour thereafter removed to an hospital for a surgical operation of a dangerous character, and it was in contemplation of that necessity and a probably fatal result that the will was drawn and executed. The making of the will was suggested by the subscribing witness Brooks, a friend and neighbor, and he drew the same after questioning the testator respecting the disposition he wished to make of his property, after which he and Dr. Barnard, the attending physician, witnessed it. The testator was in much pain during the day, and in the forenoon had fallen in the hallway and was not on his feet again until after the operation, which was apparently successful. Atkins's rehearsing the incidents of the day in detail it is sufficient to say that we find nothing in them which justifies the order refusing to admit the will

sufficient to meet the statutory requirements.

The sufficiency of the testimony of the subscribing witness Brooks is not questioned, and appellee concedes that it is the recognized rule in this State that if the attesting witnesses were of the opinion at the time the will was signed that the testator was of sound, disposing mind, they will not be permitted to change that opinion and defeat the probate of the will. While both of the subscribing witnesses testified to such an opinion, yet because the witness Bernard on cross-examination made statements somewhat inconsistent with such opinion, it is urged that the proof was insufficient to admit the will to probate.

The witness Bernard was permitted to testify on cross-examination that some time after the surgical operation the testator told him that when he fell or suffered the collapse on the day the will was executed, which was some ten hours before it was signed, he did not then recognize the doctor's brother-in-law. The witness was also permitted to express as his opinion based upon said incident that the testator was insane at that time. Regardless of the weight of such evidence, it was clearly inadmissible, as the right to probate a will is not dependent upon the belief of the attesting witnesses formed after their attestation. (In re will of Ingalls, 148 Ill. 287; Waugh v. Moan, 200 Ill. 298; Hill v. Kehr, 228 Ill. 204.) Neither the conversation nor the opinion based thereon, should have been received in evidence, or considered, nor do appellee's counsel urge consideration of it here, but properly confine their argument to the force of the witness Bernard's testimony with respect to whether he had formed an opinion on the subject of the testator's mental condition when the will was signed.

The principal testimony on that subject was as follows:

sufficient to meet the statutory requirements.

The sufficiency of the testimony of the subscribing witness Brooks is not questioned, and appellee concedes that it is the recognized rule in this State that if the attesting witnesses note of the opinion at the time the will was signed that the testator was of sound, disposing mind, they will not be permitted to change that opinion and defeat the probate of the will. While both of the subscribing witnesses testified to such an opinion, yet because the witness Brooks on cross-examination made statements somewhat inconsistent with such opinion, it is urged that the proof was insufficient to admit the will to probate.

The witness Bernard was permitted to testify on cross-examination that some time after the unusual operation the testator told him that when he fell or suffered the collapse on the day the will was executed, which was some ten hours before it was signed, he did not then recognize the doctor's brother-in-law. The witness was also permitted to argue as his opinion based upon said incident that the testator was insane at that time. Regardless of the weight of such evidence, it was clearly inconsistent, as the right to probate a will is not dependent upon the belief of the attesting witnesses formed after their attestation. (To a will of Tenth, 108 Tex. 267; Jones v. Jones, 100 Ill. 268; Hill v. Kohr, 230 Ill. 164.) Neither the contestants nor the opinion of the witness, should have been believed in evidence, or considered, as to appellee's mental condition consideration of it here, but properly confine their arguments to the force of the witness Bernard's testimony with respect to whether he had formed an opinion on the subject of the testator's mental condition when the will was signed.

The principal testimony on that subject was as follows:

"Q. You did not think of the question when you signed the will then as to whether he was competent to make a will or not? Is that the fact? A. I did not take into consideration the subject of insanity. I signed it on account of his condition, of his condition as a surgical case.

Q. You did not consider the question as to his mental condition when you witnessed the will? A. Well, no, not --

Q. You had no opinion at that moment as to his mental condition? A. No; naturally would not have."

To be sure, this testimony, if taken alone, furnishes some ground for appellee's contention, but when considered in connection with his entire testimony, and the adroit manner in which these expressions were drawn out, we think it possesses little value.

The witness had been put through a skillful cross-examination. All the incidents of the day, the suffering and pain of the testator, his critical condition, the necessity for prompt action, the attendant excitment, the witness' subsequent conversation with the testator wherein doubt was cast upon the validity of the will, the fact that he was thinking more about the surgical operation than anything else, and that he put no question to the testator and did not know whether he had read over the paper or heard it read or said a word - all these things were brought before him, manifestly with reference to drawing out such a conclusion. But in spite of such testimony he reiterated in various forms, even on cross-examination, his belief at the time of signing the will that the testator was of sound mind and memory. In one place he said: "I signed it because I saw no symptoms during the day that would lead me to believe he was insane." And again: "When I signed it I believed he was normal." And again: "I believed he was of sound mind or I would not have signed it." In this connection it may be noted that he had been acquainted with the testator some

"Q. You did not think at the question when you signed the will that he to whether he was competent to make a will or not? Is that the fact? A. I did not take into consideration the majority of insanity. I signed it on account of his condition, at his condition as a normal man.

Q. You did not consider the question as to his mental condition when you witnessed the will? A. Well, no, not --

Q. You had no opinion at the moment as to his mental condition? A. No; naturally would not have."

To be sure, this testimony, if taken alone, contains some ground for appellee's contention, but when considered in connection with his entire testimony, and the direct manner in which these expressions were drawn out, we think it possesses little value.

The witness had been put through a skillful cross-examination. All the incidents of the day, the conversing and pipe of the testator, his verbal commands, the correctly the prompt action, the attendant circumstances, the witness' subsequent conversation with the testator (during which he must upon his validity of the will). The fact that he was the witness were those the mechanical operation him anything else, and that he put to question to the testator and did not know whether he had read over the paper or heard it read or said a word - all these things were brought before him, manifestly with reference to drawing out such a conclusion. But in spite of such testimony he reiterated in various forms, even on cross-examination, his belief at the time of signing the will that the testator was of sound mind and memory. In one place he said: "I signed it because I saw no reason during the day that would lead me to believe he was insane." And again: "Then I signed it I believed he was normal." And again: "I believed he was of sound mind or I would not have signed it." In this connection it may be noted that he had been acquainted with the testator some

fifteen years and was his physician during that period.

Appellee cites on this point Hill v. Kehr, 228 Ill. 204, where the order admitting the will to probate was reversed because it appeared from the testimony of one of the subscribing witnesses that he had formed no opinion or belief on the subject as to whether the testatrix was of sound mind and memory. The subscribing witness in that case in answer to the only question put to him on the subject whether he believed the testatrix to be of sound mind and memory, said: "I have no reason to question it, because I did not know the lady." The court said:

> "It was not necessary for the witness to testify that he knew the testatrix to be of sound mind and memory, and if he had said that he believed her to be so, it would have been sufficient."

The facts in that case are entirely different from those in the case at bar. Here, as already stated, both subscribing witnesses did testify to such belief, which is all that is required by the statute to entitle the will to probate.

What was said in McGrady v. McGrady, 298 Ill. 129, with respect to the testimony of the contestants in that case, is applicable to Dr. Bernard's testimony:

> "No act or word of the testator has been shown indicating that he was lacking in mental power. The opinions rested on the testator's weakened physical condition; on his disinclination to conversation; on his statements that he had made his will but was not satisfied with it; * * * his failure to recognize persons with whom he had been acquainted."

The court there said that the opinions of witnesses based on such slight foundations, if they are admissible at all, are entitled to very little weight.

The testator's competency to execute a will both before the day in question and afterwards is conceded, and testimony to that effect was received, and we think the testimony of the subscribing witnesses was such as to entitle the will to be probated.

fifteen years and was his physician during that period.

Appellee cites on this point Hill v. Kohr, 308 Ill. 504, where the order admitting the will to probate was reversed because it appeared from the testimony of one of the subscribing witnesses that he had formed no opinion or belief as the subject as to whether the testatrix was of sound mind and memory. The subscribing witness in that case in answer to the only question put to him on the subject whether he believed the testatrix to be of sound mind and memory, said: "I have no reason to question it, because I did not know the lady." The court said:

> "It was not necessary for the witness to testify that he knew the testatrix to be of sound mind and memory, and if he had said that he believed her to be so, it would have been sufficient."

The facts in that case are entirely different from those in the case at bar. Here, as already stated, both subscribing witnesses did testify to such belief, which is all that is required by the statute to entitle the will to probate.

What was said in McCurdy v. McCurdy, 298 Ill. 129, with respect to the testimony of the contestants in that case, is applicable to Dr. Bernard's testimony:

> "No act or word of the testator has been shown indicating that he was lacking in mental power. The opinions rested on the testator's weakened physical condition; on his disinclination to conversation; on his statements that he had made his will but was not satisfied with it; * * * his failure to recognize persons with whom he had been acquainted."

The court there said that the opinions of witnesses based on such slight foundations, if they are admissible at all, are entitled to very little weight.

The testator's competency to execute a will both before the day in question and afterwards is conceded, and testimony to that effect was received, and we think the testimony of the subscribing witnesses was such as to entitle the will to be probated.

Accordingly the judgment will be reversed and the cause remanded with directions to enter an order admitting the will to probate.

REVERSED AND REMANDED WITH DIRECTIONS.

Morrill and Gridley, JJ., concur.

117 - 27950

HENRY SIMMER,
Appellee,

vs.

CHICAGO WASTE COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for personal injuries sustained by plaintiff from falling through a hole in the second floor of a building, which defendant, Chicago Waste Company, was occupying as tenant.

The declaration consists of two counts. The first charges negligence in allowing the hole to remain uncovered, and the second is based on an alleged violation of the employment statute requiring employers to fence and enclose all hoistways, hatchways, etc., in factories, etc. (Cahill's S. A. 1921, Ch. 48, Sec. 146.) The judgment appealed from was entered on a verdict for $3,000.

The accident whereby plaintiff was injured happened while he was in the employ of the owner of the building under a contract to do painting therein. He was not an employe of defendant. So far as his relation to defendant is concerned he was there only by its permission and was a mere licensee to whom, as such, it owed no duty except to refrain from wilfully and wantonly inflicting an injury upon him. (Gibson v. Leonard, 143 Ill. 182; Casey, Admr. v. Adams, 234 id. 350.) As he was not an employe of defendant he did not come within the class contemplated to be benefited by the employment

NO. [illegible] MOTION DENIED.

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for personal injuries sustained by plaintiff from falling through a hole in the second floor of a building, which defendant, Chicago Auto Company, was occupying as tenant.

The declaration consists of two counts. The first charges negligence in allowing the hole to remain uncovered, and the second is based on an alleged violation of the employers' statute requiring employers to frame and erecture all hoistways, hatchways, etc., in factories, etc. (Smith's S. & B. 1911, ch. 48, sec. 144.) The judgment rendered from was entered on a verdict for $2,000.

The weekness whereby plaintiff was injured happened while he was in the employ of the owner of the building under a contract to do painting therein. He was not an employee of defendant. So far as his relation to defendant is concerned he was there only by its permission and was a mere licensee to whom, as such, it owed no duty except to refrain from wilfully and wantonly inflicting an injury upon him. (Gibson v. Leonard, 143 Ill. 182; Toledo, Peoria & W. R. Co. v. Hammon, 114 Ill. 296.) As he was not an employee of defendant he did not come within the class contemplated to be benefited by the employment

statute, and hence no duty towards him was imposed upon defendant by such statute, (Gibson v. Leonard, supra; Rogers v. St. Louis-Carlinville Coal Co., 254 Ill. 104; Donaldson v. Spring Valley Coal Co., 175 Ill. App. 224; Beghetti v. B. F. Harry Coal Co., 186 Ill. App. 263,) and it was error to give an instruction from which the jury would infer the statute was applicable, and on which it may have based its verdict, as the hole was not enclosed.

It follows under the authorities above cited that as plaintiff was not an employe no judgment could stand on the second count, and as he was a licensee, as far as defendant was concerned, and there was no proof of a wilful and wanton injury, and hence of any violation of a duty owing from defendant, there could be no recovery under the first count. It was error, therefore, not to give an instructed verdict for defendant as requested.

But were defendant chargeable with negligence it is palpable that plaintiff was guilty of contributory negligence. While he denied the testimony of three different persons that he told them immediately after the accident that he knew the hole was there, yet his own account of the circumstances indicates that he must have known it.

The dimensions of the room were about 100 by 40 feet. It was well lighted from 25 windows. The day was bright at the time of the accident. The hole was about 6 by 3 feet in area, which was used to pass waste through the floor to a press larger than the hole on the floor immediately beneath it. Plaintiff was engaged in painting sprinkling pipes along the ceilings of the rooms. These pipes ran in parallel lines across the ceilings about 8 to 10 feet apart. On the day before the accident he painted the pipes on the ceiling of the room on the first floor,

obscure, and hence no duty towards him was imposed upon defendant by such statute, (Gibson v. Leonard, supra; Jeffers v. Ely-Norwalk-Oneida Gas Co., 264 Ill. 164; Gonzales v. Burton Tailor Coal Co., 279 Ill. App. 484; Lechner v. O. v. Merry Coal Co., 186 Ill. App. 368,) and it was error to give an instruction from which the jury could infer the statute was applicable, and on which it may have based its verdict, as the hole was not enclosed.

It follows under the authorities above cited that as plaintiff was not an employee to justification could stand on the second count, and as he was a licensee, as far as defendant was concerned, and there was no proof of a willful and wanton injury, and hence of any violation of a duty owing from defendant, there could be no recovery under the first count. It was error, therefore, not to give an instructed verdict for defendant as requested.

But were defendant chargeable with negligence it is probable that plaintiff was guilty of contributory negligence, while he denied the testimony of three different persons that he told them immediately after the accident that he knew the hole was there, yet his own account of the circumstances indicates that he must have known it.

The dimensions of the room were about 240 by 40 feet. It was well lighted from 55 windows. The day was bright at the time of the accident. The hole was about 8 by 8 feet in area, which was used to pass waste through the floor to a great lower floor. The hole on the floor immediately beneath it. Plaintiff was engaged in painting sprinkling pipes along the ceilings of the room. These pipes run in parallel lines across the ceilings about 8 to 10 feet apart. On the day before the accident he painted the pipes on the ceiling of the room on the first floor,

and was there from one-half to three-quarters of the day. He had before the accident painted all the pipes on the ceiling of the room on the second floor except to within three feet of a space the size of the hole immediately above it on the east. The pipes nearest on the north and south of said space came within 12 inches thereof and had been freshly painted. The testimony indicates that those on the ceiling of the room beneath it, which he had already painted, were about the same distance from the hole. Hence it must have been very close to him, above him when on the first floor and beneath him when on the second. It was while backing his ladder that he fell through the hole to the press and floor beneath. He admitted that when at work on the first floor he saw the press and that he necessarily looked up to the ceiling of the room, through which was the hole in question, yet testified that as he painted around the ceiling he saw no opening. On cross examination he said he did not "remember" seeing any opening, and "did not pay any attention to it." We can believe the latter statement and that for that reason he carelessly fell through the hole, but not that he did not see it. It is incredible that plaintiff did not see a hole of such size when part of the time he had to move his ladder near it, and part of the time he had to look up within a few inches of it, at least within a foot or two. Looking upward as he ascended the ladder, when on the first floor, he would see such a large open space when several feet away, and also would see it when moving his ladder near it on the second floor. It is so obvious that he must have seen it that we are constrained to express our surprise not only at the verdict but that it was permitted to stand. Because of the errors mentioned and because the ver-

and was there from one-half to three-quarters of the day. He had before the accident painted all the pipes on the ceiling of the room on the second floor except to within three feet of a space the size of the hole immediately above it on the roof. The pipes nearest on the north and south of such space were within 12 inches thereof and had been freshly painted. The testimony indicates that those on the ceiling of the room beneath it, which he had already painted, were about the same distance from the hole. Hence it must have been very close to him, above him when on the first floor and beneath him when on the second. It was while backing his ladder that he fell through the hole to the press one floor beneath. He admitted that when at work on the first floor he saw the press and that he mechanically looked up to the ceiling of the room, through which was the hole in question, yet testified that he he painted around the ceiling he saw no opening. On cross examination he said he did not "remember seeing any opening, and "did not pay any attention to it." We can believe the Jackson statement and that for that reason he unknowingly fell through the hole, but not that he did not see it. It is incredible that plaintiff did not see a hole of such size when part of the time he had to move his ladder near it, and part of the time he had to look up within a few inches of it, at least within a foot or two. Looking upward as he ascended the ladder, when on the first floor, he would see such a large open space when several feet away, and also would see it when moving his ladder near it on the second floor. It is so obvious that he must have seen it that we are constrained to conclude our suspicions not only as to the verdict but that it was procured to stand. Because of the errors mentioned and because the verdi-

dict was manifestly against the weight of the evidence, the judgment will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Morrill and Gridley, JJ., concur.

Even one manifestly against the weight of the evidence, the judgment will be reversed with a feeling of pain.

EVERSON VOID FINDING OF FACT.

Harvard Law Review, 21:, 1908:

117 - 27950

FINDING OF FACTS.

We find that appellant, Chicago Waste Company, was not guilty of negligence, as charged in the declaration, and that appellee, Henry Simmer, was guilty of negligence which contributed to the injury complained of.

143 - 27978

MERCHANTS NATIONAL FIRE INSURANCE COMPANY, successor through merger of The Merchants National Fire Insurance Company, Appellant, vs. FRANK R. THOMPSON, Appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case came before us on a former appeal, as No. 26335, and in our opinion filed November 29, 1921, we reversed the decree and remanded the cause with directions to dismiss appellant's bill for want of equity, and to enter a decree upon appellee's cross-bill in conformity with the opinion.

The issues arose upon a contract whereby appellant, Merchants National Fire Insurance Company, agreed to pay appellee, Thompson, a commission for services in effecting its consolidation with the Anglo-American Reinsurance Company. The commission was to be five per cent on the assets turned over by the latter company, part in cash and part in shares of appellant's capital stock, and appellant agreed to purchase from or sell for Thompson for cash, within six months from the date of consolidation, said shares upon a valuation to be determined in a manner provided in the contract. It is not questioned that such valuation is $17.22 per share. After the consolidation there was an adjustment of the commission by which Thompson was given the company's note for $5,725, and 236 shares of its capital stock. The bill sought the cancellation of said note and the surrender of said stock, and

DELIVERED THE OPINION OF THE COURT.

This case comes before us on a former appeal, no. 22238, and in our opinion filed November 22, 1921, we reversed the decree and remanded the cause with directions to dismiss appellant's bill for want of equity, and to enter a decree upon appellee's cross-bill in conformity with the opinion.

The issues arise upon a supplemental complaint.

Merchants National Fire Insurance Company, agreed to pay appellee, Thompson, a commission for services in effecting its consolidation with the Anglo-American Reinsurance Company. The commission was to be five per cent on the assets turned over by the latter company, part in cash and part in shares of appellant's capital stock, and appellant agreed to purchase from or sell for Thompson for cash, within six months from the date of consolidation, said shares upon a valuation to be determined in a manner provided in the contract. It is not questioned that such valuation is $27.22 per share. After the consolidation there was an adjustment of the commission by which Thompson was given the company's note for $9,728, and 326 shares of its capital stock. The bill sought the cancellation of said note and the surrender of said stock, and

the cross-bill sought to require appellant to pay said note - less a conceded indebtedness stipulated to be $2,018.76 - and to pay him $17.22 per share for said stock, with interest.

The issues thus raised called for the determination of the authority of appellant's president to make the contract and to make the adjustment of the commission later as aforesaid, which we upheld. The master's recommendations were in accordance with the prayer of the cross-bill based on their validity, and we directed the entry of a decree in accordance with such recommendations. The master found that the principal of the note should have been $5,511.69, and that there should be deducted therefrom $2,018.76, and that said stock should be paid for by the company at the rate of $17.22 per share. The master, however, made no computation of interest, and no question was raised before us or decided as to a specific sum on which, or date from which, interest should be computed, either on the note or value of the stock. That matter was left for future computation on the basis of our decision, and at the close of our opinion we directed that a decree be entered in Thompson's favor, "as recommended by the master," requiring the company "to pay the amount of his commission at five per cent on the basis calculated by the master, with interest from the time due, appellant being required to surrender said note and the stock in question."

The decree appealed from is based upon appellee's theory that the direction required computing the amount of the commission at five per cent upon the value of the assets of the Anglo-American Company, as provided for in the written contract aforesaid, and the calculation of interest thereon from the date of such consolidation. This is an entire misapprehension of the purport of our decision. It disregards the fact that the master's cal-

the cross-bill sought to require appellant to pay said note - less a conceded indebtedness stipulated to be $2,618.76 - and to pay him $17.22 per diem for said stock, with interest.

The issues thus raised called for the determination of the authority of appellant's president to make the contract and to make the adjustment of the commission later as referred, which we upheld. The master's recommendations were in accordance with the prayer of the cross-bill based on their validity, and he directed the entry of a decree in conformance with such recommendations. The master found that the principal of the note should have been $8,811.69, and that there should be deducted therefrom $2,618.76, and that said stock should be paid for by the company at the rate of $17.22 per share. The master, however, made no computation of interest, and no question was raised before us or decided as to a specific sum on which, or date from which, interest should be computed, either on the note or value of the stock. That matter was left for future computation on the basis of our decision, and at the close of our opinion we directed that a decree be entered in Thompson's favor, "as recommended by the master," requiring the company "to pay the amount of his commission at five per cent on the basis calculated by the master, with interest from the time due, appellant being required to surrender said note and the stock in question."

The decree rendered from is based upon appellee's theory that the direction required computing the amount of the commission at five per cent upon the value of the assets of the Anglo-American Company, as provided for in the written contract alleged, and the calculation of interest thereon from the date of such certification. This is an entire misapprehension of the purport of our decision. It disregards the fact that the master's cal-

culations were based upon the adjustment of the commission and recognized that the arrangement whereby the note and stock were taken in settlement thereof was valid and should be enforced, and that was the effect of our decision. Hence the term "commission" as used in said direction referred to said note and stock accepted in settlement thereof, and interest should be computed on what was due on each at the conceded rate of five per cent.

But the question arises from what dates and on what sumsshould interest be computed?

The master found that the amount due on the note was $5,511.89, less a conceded indebtedness of $2,018.76. While he did not find, and the evidence does not sufficiently disclose, at what particular time or times the conceded indebtedness arose, yet the cross-bill treats the same as due on the date of the note, for the prayer thereof is that the complainant company be decreed "to pay the amount of said note, with interest thereon, at the rate of five per cent per annum from July 25, 1916, less the sum of $2,087.52" (stipulated to be $2,018.76). We think, therefore, that both upon the evidence and construction of the pleading, which must be taken most strongly against the pleader, the interest on the note should be computed on the sum of $3,493.93 from July 25, 1916, to the date of the decree.

The agreed value of the stock is $4,063.92. Under the terms of the written contract between the parties the company agreed to purchase within six months from the date of consolidation such number of the shares issued to appellee as he "desired to dispose of." The record discloses no clear expression of his desire until he made a formal demand upon appellant, March 24, 1918, the day before the bill was filed, to take over the stock. He did not

quotations were based upon the adjustment of the commission and recognized that the arrangement whereby the men and steam were taken in additional tonnage was valid and should be enforced, and that pro rata effect of our decision. Hence the term "commission" as used in said direction referred to gross and about accepted in additional tonnage, and interest should be computed on what was due on each of the concerned rate of five per cent.

But the question arises from what dates and on what amounts interest is computed?

The master found that the amount due on the main was $9,811.80, less a recorded indebtedness of $7,218.76. While he did not find, and the evidence does not sufficiently disclose, at what particular time or times the recorded indebtedness arose, yet the cross-bill treats the sums as due on the date of the main. For the proper theory is that the complainant company be charged "as per the manner of doing work," with interest thereon at the rate of five per cent per annum from July 26, 1916, less the sum of $2,027.82" (originated to be $2,018.76). We think, therefore, that both upon the evidence and considerations of the pleading, which must be taken most strongly against the pleader, the interest on the main should be computed on the sum of $9,811.80 from July 26, 1916, to the date of the decree.

The agreed value of the vessel is $9,000.00. Under the terms of the written contract between the parties the company agreed to purchase within six months from the date of reconditioning such number of the shares issued to equalize as be "desired to dispose of." The record indicates no claim, consideration of his duties will be such a record cannot upon equitable, treats the, 1917, the day before the bill was filed, in take over the stock. He did not

tender the same, as he should have done, but the filing of the bill, which was tantamount to a refusal of the demand, obviated the necessity of tender thereafter. It is, therefore, only from the date of such refusal that interest can be computed on the value of the stock.

But it is the contention of appellant that no interest can be computed thereon, the basis of the claim being that said contract is not an instrument in writing within the meaning of section 2 of the Interest Act, because it was not signed by appellant. It was, however, signed by appellee and left with and retained by appellant as evidence of the understanding between them. Where a contract, after its execution by one party is accepted by the other, it becomes binding on both, though not executed by the other, (Rigdon v. Conley, 141 Ill. 565), and it constitutes a written agreement between them as if signed by both. (Harts v. Emery, 184 Ill. 560.) We think, therefore, the contract was an instrument in writing within the meaning of the Interest Act.

Accordingly the decree will be reversed with directions to enter a decree for the aggregate amount of the two sums, namely, the balance due on the note, $3,492.93, with interest thereon at five per cent from July 25, 1916, and $4,063.92, the value of the stock, with interest thereon at five per cent from March 25, 1918.

REVERSED AND REMANDED WITH DIRECTIONS.

Morrill and Gridley, JJ., concur.

lender the same, as he should have done, but the filing of the bill, which was instituted in a refusal of the demand, obviated the necessity of lender thereafter. It is, therefore, only from the date of such refusal that interest can be computed on the value of the stock.

But it is the contention of appellant that no interest can be computed thereon, the basis of the claim being that said contract is not an instrument in writing within the meaning of section 2 of the Interest act, because it was not signed by appellant. It was, however, signed by appellee and left with and retained by appellant as evidence of the understanding between them. There a contract, after its execution by appellee is accepted by the other, it becomes binding on both, though not executed by the other. (Hayes v. Hayes, 14 Ill. App. 111, 117, and it constitutes a written agreement between them as if signed by both. (Hayes v. Hayes, 104 Ill. 500.) We think, therefore, the contract was an instrument in writing within the meaning of the Interest act.

Accordingly the decree will be reversed with directions to enter a decree for the appellee amounting of the two sums, namely, the balance due on the note, $6,492.02, with interest thereon at five per cent from July 28, 1914, and $4,083.08, the value of the stock, with interest thereon at five per cent from March 28, 1918.

REVERSED AND REMANDED WITH DIRECTIONS.

Mercill and Overlay, JJ., concur.

154 - 27989

JOSEPH MOSP,
Appellee,

vs.

JOHN J. O'NEILL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer. The plaintiff was given a judgment for possession. The lease was from W. J. Johnson to appellant, O'Neill, and expired April 30, 1922. On March 7, 1922, Johnson's agents sent O'Neill a postal card which read as follows:

> "The lease on the premises now occupied by you expires April 30, 1922. The rental from May 1, 1922, will be $40 per month. The renting season is now on and we must know not later than March 14, 1922, if you want to renew your lease at this rent. An early reply on the attached postal card will be appreciated."

It is claimed on the part of appellee that no reply thereto was received, and on the part of defendant that one was mailed on the same or following day on the attached postal card. But if a reply was sent it nowhere appears in the record what were its contents, and the sole contention of appellant is that said postal card and reply constituted a renewal of the lease. The card mailed to him was not an offer to renew the lease but a mere request to know whether he wanted to renew it, and an affirmative answer thereto would not alone have constituted an agreement to extend the lease, and a few days later defendant was so apprised in effect. For on March 18th the same agents sent him this letter:

IN. PLAINTIFF'S CLAIM BARRED

DEFENDANT'S ORIGINAL ON THE COURT.

This is an action in interpleader. The plaintiff was given a judgment for possession. The issue was from N. J. Jackson to appellant, O'Neill, and against Lyal G. Ian. In April 7, 1932, Johnson's agents sent O'Neill a postal card which read as follows:

> "The lease on the premises now occupied by you expires April 30, 1932. The rental from May 1, 1932, will be $20 per month. The renewing means is now on and we must know you later than March 14, 1930, if you want to renew your lease at this rate. Be early reply on the attached postal card will be appreciated."

It is claimed on the part of appellee that no reply thereto was received, and on the part of defendant that one was mailed on the same or following day on the attached postal card. But if a reply was sent it mysteriously disappeared in the course of its transit to Johnson, and the sole contention of appellant is that said postal card and reply constituted a renewal of the lease. The card mailed to him was not an offer to renew the lease but a mere request to know whether he wanted to renew it, and an affirmative answer thereto would not alone have constituted an agreement to extend the lease, and a few days later defendant was so apprised in effect. For on March 14th the same agents sent him this letter:

"We are sorry to advise you that the house you occupy is under contract for sale and that the lease cannot be renewed. We shall have to ask for possession on April 30, 1922."

After receipt of that letter the wife of the tenant called on the agents and was informed that the owner wished to move into the house. Without taking any further steps in the matter, so far as the record discloses, defendant remained in possession and on May 4th plaintiff, who, as the evidence tends to show, purchased the premises in the meantime under said contract, served upon him a written notice demanding possession thereof.

As the claim that there was an extension of the lease is untenable and it is the only point made and argued by appellant, the judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

"We are sorry to advise you that the house you occupy is under contract for sale and that the lease cannot be renewed. We shall have to ask for possession on April 30, 1952."

After receipt of that letter the wife of the tenant called on the agents and was informed that the owner wished to move into the house. Without taking any further steps in the matter, so far as the record discloses, defendant remained in possession and on May 6th plaintiff, who, as the evidence tends to show, purchased the premises in the meantime under a land contract, served upon the defendant a written demand for possession thereof.

In the claim that there was an extension of the lease is untenable and it is the only point made and argued by appellant, the judgment will be affirmed.

AFFIRMED.

Costs to appellee. It.; Sweet.

162 - 27997

STANLEY CZYZ and FRANCISZKA CZYZ, Appellants, vs. MICHAEL WEGLARZ, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer and for rent, brought here upon an agreement as to the facts and points of law pursuant to section 104 of the Practice Act.

The lease ran to appellee from May 14, 1919, to May 14, 1924, at a rental of $35 per month, payable in advance upon the first day of each and every month of the term. Appellants became the owners of the premises and assignees of the lease about August 15, 1921, from which time appellee paid them the rent until July 14, 1922. After a demand made upon appellee July 15, 1922, for the rent for the month beginning that day, and his refusal to pay the same, appellants, on July 20, 1922, served a written notice on him demanding immediate possession of the leased premises for failure to pay said rent, and commenced this action the next day.

The lease contained this provision:

> "If default be made in the payment of the rent above reserved, or any part thereof, * * * it shall be lawful for the party of the first part, or the legal representatives of said party, at any time thereafter, at the election of said first party, or the legal representatives thereof, without notice or demand of rent, to declare said term ended, and to reenter said demised premises, or any part thereof, either with or without process of law * * * and the said premises again to repossess."

CHARLOTTE CITY and PARKINGTON CITY, appellants,	
vs.	
MICHAEL WALKER, appellee.	

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

E. MUNICIPAL JUSTICE RAMSEY
DELIVERED THE OPINION OF THE COURT.

This is an action in tortsitle ejectment and for rent, brought here upon an agreement as to the facts and points of law pursuant to section 104 of the practice act.

The lease was to appellee from May 14, 1930, to May 14, 1931, at a rental of $35 per month, payable in advance upon the first day of each and every month of the term. Appellants became the owners of the premises and assignees of the lease about August 30, 1932. Two months thereafter appellee paid them the rent until July 14, 1933. After a demand made upon appellee July 15, 1933, for the rent for the month beginning that day, and his refusal to pay the same, appellants, on July 20, 1933, served a written notice on him demanding immediate possession of the leased premises for failure to pay said rent, and commenced this action the next day.

The lease contained this provision:

> "If default be made in the payment of the rent above reserved, or any part thereof, * * * it shall be lawful for the party of the first part, or the legal representatives of said party, at any time thereafter, at the election of said first party, or the legal representatives thereof, without notice or demand of rent, to declare said lease ended, and to reenter said demised premises, or any part thereof, either with or without process of law * * * and the said premises again to repossess."

Appellants contend that said notice was an election to terminate the tenancy upon which a right of action for possession immediately accrued, and appellee contends that said notice brings the case within the purview of section 9 of the Landlord and Tenant Act requiring a ten days' notice to quit before bringing action. The court upheld appellee's theory and gave judgment in his favor, and we are asked to decide which of the two contentions is the law.

Appellee has not favored us with a brief in support of his theory. But we think it will not be questioned that said notice was an act of election on the part of appellants and operated to terminate the lease eo instanter. If so, we think there can be no question that under said provision of the lease, which gives the right "without notice" to reenter "without process of law," the right of action for possession immediately accrued. In Clark v. Stevens, 221 Ill. App. 233, the lease contained a like provision, and the tenant being in default, it was held that the suit for possession was of itself an election to terminate the tenancy without notice. Here, however, the election was expressly declared before suit was brought. If the bringing of the suit itself constitutes an election then the notice was entirely superfluous. But were it otherwise, it cannot be reasonably contended that because such notice was given appellants would be required to proceed thereunder as upon a statutory notice and could not avail themselves of their right under said provision which dispenses with the necessity of notice and authorizes reentry without process of law.

In Espen v. Hinchcliffe, 131 Ill. 468, it was held that a demand for rent under section 8 of the Landlord and

Appellants contend that such notice was an election to terminate the tenancy upon which a right of notice for possession immediately accrued, and therefore contend that such notice brings the case within the purview of section 3 of the Landlord and Tenant Act requiring a ten days' notice to quit before bringing action. The court upheld appellee's theory and gave judgment in his favor, and we are asked to decide which of the two contentions is the law.

Appellee has not favored us with a brief in support of his theory. But we think it will not be questioned that such notice was an act of election on the part of appellants and operated to terminate the lease on Thursday. If so, we think there can be no question that under said provision of the lease, which gives the right to "quiet enjoyment" to renters "without process of law," the right of action for possession immediately accrued. In Black v. Stevens, 254 Ill. App. 522, the lease contained a like provision, and the tenant being in default, it was held that the suit for possession was of itself an election to terminate the tenancy without notice. There, however, the election was improperly declared before suit for brought. If the bringing of the suit itself constitutes an election when the notice was actually unauthorized. But were it otherwise, it cannot be reasonably contended that because such notice the tenant opportunity would be required to proceed thereunder or upon a statutory notice and could not avail himself of their right under said provision which dispenses with the necessity of notice and authorizes ejectment without process of law.

In Tuck v. Hagenbeck, 21 Ill. App. 21, it was held that a tenant for year under notice of the landlord and

Tenant Act was unnecessary to entitle the landlord to bring suit for possession where the lease provided that the mere non-payment of the rent should constitute a forcible detainer. We fail to see any distinction in principle between that case and this. The force of the provision aforesaid giving the lessor the right in case of non-payment of rent to terminate the lease "without notice" and to reenter "without process of law," is to dispense with the necessity of giving notice to quit under section 9. The action was brought pursuant to the right conferred by the lease, and not upon a notice to quit under said section 9, which was waived by said provision.

Appellee being in default his tender of rent after said notice and before trial was of no avail.

Accordingly the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Morrill and Gridley, JJ., concur.

Tenant Act was unnecessary to entitle the landlord to bring suit for possession where the issue provided that the mere non-payment of the rent should constitute a forfeiture. He fail to see any distinction in principle between that case and this. The force of the provision referred giving the lessor the right in case of non-payment of rent to terminate the lease "without notice" and to resort "without process of law," is to dispense with the necessity of giving notice to quit under section 8. The notice was brought pursuant to the right conferred by the lease, and not upon a notice to quit under said section 8, which was waived by said provision.

Appellee being in default his tender of rent after said notice and before suit was of no avail.

Accordingly the judgment must be reversed and the cause remanded.

DISSENTING AND REMARKING.

Martin and Cooley, J.J., dissent.

128 - 27602

HENRY QUINDEL,
Appellee,

vs.

HARRY H. SCHOPPE and
LOUIS SCHOPPE,
Appellants.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

228 I.A. 607

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from judgment for $500 entered in favor of the plaintiff and upon the verdict of a jury. There have been two trials and the verdict in each case was in favor of the plaintiff. Upon the last trial the motions of the defendants for a new trial and in arrest of judgment were overruled and this appeal prayed and allowed. At the close of all the evidence the defendants requested that the court instruct the jury to return a verdict for defendants, and the denial of this motion is the alleged error relied on.

In several counts of the declaration it is charged that the defendants on October 15, 1920, entered into a verbal agreement with the plaintiff whereby they employed him to procure a purchaser of their farm of 113 acres in Palatine, Illinois, and agreed to pay him a commission on the purchase price; that the plaintiff procured a purchaser for the sum of $20,000, and defendants sold the premises to him for said sum and thereupon became indebted to the plaintiff for the commission.

There was evidence tending to show that the defendants are brothers and were owners of a farm of 113 acres in Cook County, Illinois, in the town of Palatine; that plaintiff was a broker dealing in farm property in that vicinity; that he had known defendants for about twenty-five years. He says that he had a talk with them about October 15, 1920, at their store; that "They asked

me if I thought I could get a buyer for the farm, and I said I would do my best to get in touch with different brokers and try to make a deal. We talked about the price and agreed that we should ask $200 per acre. They asked $185. I said we can always come down if we had to. They said, 'All right.' I said I would try my best to make a deal for the sale of their farm."

There is also evidence tending to show that after that time plaintiff advertised the farm in the Chicago Tribune some five or six times; that he found one buyer who wanted to trade some Dakota land for the Cook County farm, but this trade was declined; that November 15th plaintiff received a letter from one Krajinski, who lived in Chicago, stating that he had a party who wanted to see the farm; that through an arrangement made with plaintiff, Krajinski came out from the city with the proposed purchaser, and that plaintiff showed him around the farm; that this proposed purchaser's name was Warum; that on the Friday following the visit Krajinski, in behalf of Warum, made an offer of $19,000 for the farm; that on November 28th Krajinski came to plaintiff's office and made an offer of $20,000; that on the following day plaintiff took the matter up with the defendants and told them he had a purchaser for $20,000; that one of the defendants asked if that was net to them, and plaintiff said no, that the commission would have to come out of that; that one of the defendants asked the name of the prospective purchaser, and plaintiff told him it was Warum; that one of the defendants then said he would think it over and would let plaintiff know the following night; that on December 1st plaintiff saw defendant Harry Schoppe, who said he had talked it over with Henry and that they had decided that they "could not take less than $20,000 for their end;" that plaintiff then said, "We will have to see if we can get them up

as if I thought I could get a bonus for the task, and I said I would do my best to get in touch with citizens leaders and try to make a deal. He talked about the price and agreed that we should add $200 per note. They never lied. I said we can change some down if we can do. Then said, "All right." I said I would try my best to make a deal for the sake of Uncle Tom."

There is also evidence tending to show that Alex Haley's overreaching the fact in the Gilmore letters came first or at least, when he found out Wright was trained in trade more heavily than the dust jacket claims, his mind began was beginning; that motivated Alex Haley's decision to a letter from his friends, who lived in Gilmore, urging them to be a model who would be the first; that trends to demonstrate some civil rights, contained some of that his art, also the processed pro-ducer, and that Haley's mind the manner to Tom; that Alex Haley's mind's was Tom; he's of the Gilmore Gilmore the Black Haley's letters, in behalf of Tom, made an offer of $2,000 for the Tom; that he Tom's contained some in Haley's offer and made an offer of $2,000; that he the following day Haley's made the author to sell the manuscript and tell them he had a promoter for $8,000; that one of the defendants means it that was not in time, and Haley's said so, that the complaint would have to come out of that; that one of the defendants raised the name of the promoter's producer, and Haley's said the man was Tom; that one of the defendants then said: he would claim if ever man would let Haley's have the Gilmore right; that he remember the Haley's and defendant Harry Mahoney, who said he had talked to them with Harry and that they had mentioned that they "would not take less than $8,000 for their book;" that Haley's made said, "We will have to see if we can get them up

to $21,000, so that we can get our commission;" that plaintiff then called up Krajinski and told him that they would have to have $21,000; that on the following evening plaintiff reported to defendants that Krajinski had said that they had not decided; that plaintiff continued his negotiations with Krajinski, and was finally informed by him about the 12th of December that the proposed purchaser had decided to wait until after the holidays; that a day or two thereafter plaintiff heard of the sale of the farm, which had as a matter of fact been made to Warum on December 8th. These facts are on material points - especially as regards the first conversation - denied by the defendants; but we must regard all issues of fact as settled in favor of the plaintiff by the verdict of the jury, which has been approved by the trial court.

The general rule is that a broker in order to earn his commission must produce a purchaser able, ready and willing to buy at the price authorized. There is no doubt under the evidence that the plaintiff produced a purchaser for the farm, but appellants say that because there is uncontradicted evidence which tends to show that defendants paid a commission to another broker, through whom the deal was consummated, they are not liable to plaintiff. We do not agree with this contention. It is true that plaintiff was not given the exclusive agency, and that defendants therefore had a right to sell to any purchaser produced by another broker, or indeed to any purchaser that defendants might have found themselves, without becoming liable to the plaintiff for commission. But we think that neither defendants themselves, nor defendants acting through their brokers, had any right, while negotiations were pending with the proposed purchaser produced by plaintiff, to close a transaction begun by the plaintiff and thus deprive him of the fruits

is $21,000, so that we are yet one assessment; that plaintiff then called by Kirpliewski and told him that they would have to have $21,000; that on the following evening plaintiff received a defendants that Kirpliewski had said that they had not included that plaintiff continued his negotiations with Kirpliewski, and was finally informed by him about the 12th of December that the proposed purchaser had decided to wait until after the holidays; that a day or two thereafter plaintiff heard of the sale of the farm, which had as a matter of fact been made to Tarns on December 8th. These facts are on material points - especially as regards the first conversation - denied by the defendants; but we must regard all issues of fact as settled in favor of the plaintiff by the verdict of the jury, which has been approved by the trial court.

The present suit is that a broker is entitled to recover his commission when produce a purchaser able, ready and willing to buy at the price authorized. There is no doubt under the evidence that the plaintiff produced a purchaser for the farm, but appellants say that because there is uncontradicted evidence which tends to show that defendants paid a commission to another broker, through whom the deal was consummated, they are not liable to plaintiff. We do not agree with this contention. It is true that plaintiff was not given the exclusive agency, and that defendants therefore had a right to sell to any purchaser produced by another broker, or indeed to any purchaser that defendants might have found themselves, without incurring liability to the plaintiff for commission. But we think that neither defendants themselves, nor defendants acting through their brokers, had any right, while negotiations were pending with the proposed purchaser produced by plaintiff, to close a transaction begun by the plaintiff and thus deprive him of the fruits

of his labor. The evidence does not show that plaintiff had abandoned the deal with Warum (Rigdon v. More, 226 Ill. 382), and plaintiff is, we think, entitled to recover within the rule laid down in Hafner v. Herron, 165 Ill. 246, and Henry v. Stewart, 185 Ill. 453; Rasar & Johnson v. Spurling, 176 Ill. App. 349.

Appellants also complain of instructions given by the court, but the instructions are not abstracted and, under a well known rule, this court will therefore not consider this point. Village of Downers Grove v. American Merchant Co., 218 Ill. App. 608.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

of his labor. The evidence does not show that plaintiff was discharged for that with Thomas (Cohen v. Berg, 194 Ill. App. 3d, and plaintiff is, on claim, entitled to recover within the sums laid down in Barker v. Barker, 288 Ill. App. 3d 1, and Cohen v. Berger, 194 Ill. App. 3d; Tower & Tobman v. Gerstein, 170 Ill. App. 519.

Plaintiff also complains of instructions given to the court, but the instructions are not abstracted and cannot be well based here. This court will disregard not complete into point. Village of Barrett Grove v. Heritage Enterprises Inc., 22 Ill. App. 3d.

The judgment is affirmed.

AFFIRMED.

McGloon, P. J., and Davis, J., concur.

241 - 27717

MARY A. DOWNES, administratrix of the estate of JOHN J. DOWNES, deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff's intestate, John J. Downes, a policeman of the City of Chicago, was struck by one of defendants' street cars about 9 p.m. November 13, 1919, and died a few days later from the injuries he received. This suit was brought to recover damages to the next of kin, which the jury assessed at $9000. From the judgment thereon this appeal is taken.

The accident happened in said city at or near the intersection of 75th street, which runs east and west, with Crandon avenue, which runs north and south. He was on duty and apparently about to go to a patrol box one-half mile east of that place. The car was going east on 75th street and he was crossing that street from the north at or near the west side of Crandon avenue. It was a bright, clear night. The intersection was well lighted and so was the car. There was nothing to prevent his seeing or hearing it. In fact he waved to it as he approached its path. There were no other persons at or near the place of the accident at the time, except plaintiff's two main witnesses, a Mr. Healy and Miss Fisher, who were in a west bound automobile on 75th street about the middle of the block east of Crandon avenue, and the

ALMER L. DUNCAN, administrator
of the estate of JOHN J. DUNCAN,
deceased,

Appellee,

vs.

CHICAGO RAILWAYS SYSTEM et al.,
Appellants.

ALBERTA DUNN
Appellee,

vs.

CHICAGO RAILWAYS SYSTEM et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
COOK COUNTY.

MR. JUSTICE FRANCIS SCHERER
DELIVERED THE OPINION OF THE COURT.

Plaintiff's intestate, John J. Duncan, a resident of the city of Chicago, was struck by one of defendants' cars about 6 p.m. December 21, 1931, and died a few days later from the injuries he received. This suit was brought to recover damages on the ground of negligence. Plaintiff recovered in 1000. From the judgment thereon this appeal is taken.

The evidence disclosed in said city on or near the intersection of 79th street, which runs east-west, and Cottage Grove, which runs north and south. In one of duty and apparently about to go to a point beyond the east-bound main of that place. The car was going east on 79th street and he was crossing that street from the north at or near the west side of Prairie avenue. It was a bright, clear night. The intersection was well lighted and so was the car. There was nothing to prevent him seeing or hearing it. In fact he testified he did so in approaching the path. There were no other persons at or near the place of the accident at the time.

Plaintiff, who was 24 a year bound stenographer in 1931, stated that he was struck by the car and knocked down. He was unconscious for a short time. He was taken to a near hospital where he remained for a few days. He testified that he was

motorman, conductor and a passenger on the street car. No one of the latter either saw Downes or knew of the accident until after it happened.

The declaration contained two counts besides one for wilfulness and wantonness which was dismissed before the trial. One of the two counts charged negligence in the management and operation of the car, and the other, in failing to sound a gong. We need not consider the latter for as deceased unquestionably saw the car and knew it was coming he needed no gong to give him notice thereof; and we deem it unnecessary to consider the general charge of negligence in the operation of the car in view of our conclusion that the evidence does not show that deceased exercised due care for his own safety.

Plaintiff's case depends almost wholly upon the evidence of the two witnesses in the automobile. They testified at the coroner's inquest and at two trials of this case. Healy did not pretend to see the deceased until just about the time of the collision. So far as relevant his testimony is somewhat contradictory. But it is mainly to Miss Fisher's testimony that appellee must look for support of the verdict. Her variant versions of material facts on the different occasions and even at the last trial are so inconsistent and contradictory as to entitle her evidence to little weight. Much of her testimony unquestionably supports the inference that the deceased was guilty of contributory negligence.

Certain material facts are not in dispute. The car had no occasion to stop at the intersection. No passengers were to be let off or taken on at that point. No claim is made that the car was checked for any such purpose, or that anything was done that would indicate to deceased a purpose to stop the car at that point. Nothing was in its path that

motorman, conductor and a passenger on the street car. No one of the latter either saw the horses or knew of the accident until after it happened.

The declaration contained two counts besides one for alleged and contemporaneous which was dismissed before the trial. One of the two counts charged negligence in the management and operation of the car, and the other, in failing to sound a gong. We need not consider the latter for as discussed immediately one his car and knew it was coming he needed no gong to give him notice thereof; and we deem it unnecessary to consider the general charge of negligence in the operation of the car in view of our conclusion that the evidence does not show that defendant exercised due care for his own safety.

Plaintiffs now depend almost wholly upon the evidence of the two witnesses in the automobile. They testified at the member's instance and at the trial of this case. Neither did not pretend to see the accident until just about the time of the collision. So far as relevant his testimony is somewhat contradictory. But it is unlikely to alter Fisher's testimony that objection must lack for support of the verdict. For contrary versions of material facts as the witness recounts, an even of the last trial are to immaterial for contradictory is to provide for evidence to little weight. And at for testimony unquestionably supports the inference that the defendant was guilty of contributory negligence.

Certain material facts are not in dispute. The car had a occasion to stop at the intersection. The motorman was to be left off or taken on at that point. He could be such that the car was checked for any such purpose, or that operating was done that would indicate to demand a purpose to stop the car at that point. Nothing was in the path that

called for checking its speed, whatever it was, in crossing the intersection. The testimony of Miss Fisher, who alone claims to have seen the deceased as he left the north curb of 75th street to cross it, to the effect that deceased signaled to the car by raising or waving his hand as he approached its path, is not disputed. Her testimony, however, as to where he was and how far he was from the car when he so signalled is decidedly contradictory and in many respects favorable to the defense. She was the only witness of the conduct of deceased prior to his injury. Healy saw him only just as he was hit and fell into the west bound or north track. While Healy's testimony conformed more nearly to that of defendants' witnesses and theory, and in fact to what Miss Fisher testified to on one occasion, that the deceased was struck some fifty feet west of the crossing, thus indicating that he was trying to cross in front of the car before it reached the intersection, yet accepting plaintiff's theory of the case that the deceased was on the line of the west cross walk at the time of the collision, there is a decided preponderance of evidence that he was guilty of contributory negligence in attempting to cross in front of the car.

At the coroner's inquest Miss Fisher testified that he was on a run and that the front end of the car seemed to her to hit his shoulder and turned him around. At the prior trial she said she did not know whether he was running or walking; at the last trial she testified that he was walking at an ordinary gait. As to where Downes was when he signalled to the car she testified at the last trial that he was about in the center of the west bound track. At the inquest she admitted that she said nothing about seeing him raise his hand at all or about seeing him walk from the north curb to the track. On the first trial of the case she testified that when

called for checking its speed, whatever it was, in crossing the intersection. The testimony of Miss Fisher, who alone claims to have seen the deceased as he left the north curb of 73th street to cross it, to the effect that deceased signaled to the car by raising or waving his hand as he approached its path, is not disputed. Her testimony, however, as to where he was and how far he was from the car when he so signalled is decidedly contradictory and in many respects irreconcilable to the defense. She was the only witness of the occurrence of deceased prior to his injury. Nearly her him only just as he was hit and fell into the west bound or north track. While Nearly's testimony confirmed more nearly to that of defendant's witnesses and theory, and in fact to what Miss Fisher testified to on one occasion, that the deceased was struck some fifty feet west of the crossing, that indicating that he was trying to cross in front of the car before it reached the intersection, yet accepting plaintiff's theory of the case that the deceased was on the line of the west bound walk at the time of the collision, there is a decided preponderance of evidence that he was guilty of contributory negligence in attempting to cross in front of the car.

As the motorman's lookout Miss Fisher testified that he was on a run and that the front end of the car passed to her to hit his shoulder and turned him around. At the prior trial she said she did not know whether he was running or walking; at the last trial she testified that he was walking at an ordinary gait. As to where Downes was when he signalled to the car she testified at the last trial that he was about in the center of the west bound track. At the inquest she admitted that she said nothing about seeing him raise his hand at all or about seeing him walk from the north curb to the

In view of testimony indicating that Downes was spun or turned around and thrown in a direction at a right angle with that of the car instead of in front of it or diagonally away from it, the conclusion is unescapable that he barely had time to get into the course of the car when he was struck, and therefore that he could not have been exercising ordinary care for his own safety.

Healy did not pretend to see deceased until he was within three feet of the car. Evidence as to what deceased did before reaching that point with reference to exercising care for his own safety rests entirely upon Miss Fisher's testimony. As before stated, it is too uncertain, contradictory and unreliable to permit a verdict to rest upon it, especially as her sworn testimony on several occasions is not only inconsistent with the theory of negligence on the part of defendants but with the exercise of due care by deceased for his own safety.

In passing consideration of the question of defendant's negligence which, in view of our conclusion need not be discussed, we may nevertheless say that as against the experience of the motorman and the conductor with regard to the speed in which a car moves we would be extremely reluctant to accept as conclusive the testimony of either Healy, that he thought it was moving from 18 to 20 miles an hour, or the opinion of Miss Fisher that it was moving from 20 to 25 miles an hour, in view of their unfavorable position at best to judge of its speed with any degree of accuracy, approaching, as they were at night in the line of the car a block or so away from it. If the car was going at such a rate of speed then deceased being in a better position to judge of that fact than they were he must have known that if the car did not stop - and there was no

In view of testimony indicating that Downes was spun or turned around and thrown in a direction at a right angle with that of the car instead of in front of it or diagonally away from it, the conclusion is unescapable that he barely had time to get into the course of the car when he was struck, and therefore that he could not have been exercising ordinary care for his own safety.

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In passing consideration of the question of defendant's negligence which, in view of our conclusion need not be discussed, we may nevertheless say that we against the appellants of the motorman and the conductor with regard to the speed in which a car moves we would be extremely reluctant to accept as conclusive the testimony of either Healy, that he thought it was moving from 18 to 20 miles an hour, or the opinion of Miss Fisher that it was moving from 20 to 25 miles an hour, in view of their unfavorable position at best to judge of its speed with any degree of accuracy, approaching, as they were at night in the line of the car a block or so away from it. If the car was going at such a rate of speed that deceased being in a better position to judge of that fact than they were he must have known that if the car did not stop - and there was no

In view of testimony indicating that Downes was spun or turned around and thrown in a direction at a right angle with that of the car instead of in front of it or diagonally away from it, the conclusion is unescapable that he barely had time to get into the course of the car when he was struck, and therefore that he could not have been exercising ordinary care for his own safety.

Healy did not pretend to see deceased until he was within three feet of the car. Evidence as to what deceased did before reaching that point with reference to exercising care for his own safety rests entirely upon Miss Fisher's testimony. As before stated, it is too uncertain, contradictory and unreliable to permit a verdict to rest upon it, especially as her sworn testimony on several occasions is not only inconsistent with the theory of negligence on the part of defendants but with the exercise of due care by deceased for his own safety.

In passing consideration of the question of defendant's negligence which, in view of our conclusion need not be discussed, we may nevertheless say that as against the experience of the motorman and the conductor with regard to the speed in which a car moves we would be extremely reluctant to accept as conclusive the testimony of either Healy, that he thought it was moving from 18 to 20 miles an hour, or the opinion of Miss Fisher that it was moving from 20 to 25 miles an hour, in view of their unfavorable position at best to judge of its speed with any degree of accuracy, approaching, as they were at night in the line of the car a block or so away from it. If the car was going at such a rate of speed then deceased being in a better position to judge of that fact than they were he must have known that if the car did not stop - and there was no

In view of testimony indicating that Brown was alone or nearly around and Stone is a dependable at a right angle with that of the car instead of in front of it or diagonally away from it, the assumption is inconceivable that he barely had time to jump into the action of the car when it was moving, and therefore that he could not have been exercising ordinary care for his own safety.

Healy did not proceed to see discovered until he was within three feet of the car. Evidence as to what occurred did before reaching that point is reference to exercising care for his own safety rests entirely upon Miss Fluker's testimony. As before stated, it is too uncertain, contradictory and unreliable to permit a verdict to rest upon it, especially as her sworn testimony on several occasions is not only inconsistent with the theory of negligence on the part of defendants but with the exercise of due care by deceased for his own safety.

In passing consideration of the question of defendant's negligence which, in view of our conclusion need not be discussed, we may nevertheless say that evidence the supervisor of the person and the conductor with regard to the speed in which a car moves so small be sufficiently relevant to warrant an inference the testimony of either that, that he thought it was moving from 12 to 20 miles an hour, or the opinion of Miss Fluker that it was moving from 30 to 35 miles an hour, is view of their unfavorable position at best to judge of the speed with any degree of accuracy, approaching, as they were at right in the line of the car a block or so away from it. If the car was going at such a rate of speed that deceased being in a better position to judge of that fact than they were he must have known that if the car did not stop - and there was no

indication that it was going to - he was taking chances in attempting to cross its path when it was so near him. And if it was moving at the lesser speed testified to by defendants' witnesses then it must have been even closer to him when he stepped upon its track. At whatever speed it was going if, as testified to by Miss Fisher, it was only twelve feet away when he stepped into its track and he was not hastening, the conclusion of his carelessness cannot be escaped. There is no question in our minds that the verdict is against a decided preponderance of the evidence, and that it becomes our duty for that reason to reverse the judgment with a finding of fact.

REVERSED WITH FINDING OF FACT.

Morrill and Gridley, JJ., concur.

Considering that it was going to be a full and lasting contract in attempting to assess its final value it will be much too. And if it was working as the latest speed statistics in my national motor situation that it would have been even closer to the mark on respect when its first. It maintained speed it was going it, as testified to by this witness, it was only another two week when he stopped into its stand and to see not Saturday. The economics of his correspondence lacked to manage. There is no question in our minds that the vehicle is equipped a lesser circumstances of the evidence, and that is because our duty for this issue to prevent the judgment sets a finding of fact.

Entered this fifth of July.

Merrill and Brown, J.J., concur.

241 - 27717

FINDING OF FACT.

We find that the deceased, John J. Downes, did not exercise ordinary and reasonable care for his own safety, and was guilty of negligence contributing to the cause of his death.

256 - 27732

HELGA FREDIN, Appellee, vs. CHARLES A. STEVENS & BROS., a corporation, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee filed her statement of claim to the effect that she purchased of appellant on December 23, 1921, a two-piece ladies suit at the price of $125, which she paid; that appellant warranted the suit to be of first-class, good wearing material; that the suit was shop worn and defective and had been torn and mended; and that appellant refused after demand therefor to refund the purchase price.

Plaintiff testified that she had worn the garment on three different occasions before she made the first attempt to return it and to rescind the sale, and had worn it on nine or twelve different occasions before the trial, and was wearing it at the time of the trial and had no other garment to put on in case her offer to return the garment had been accepted.

Her testimony was to the effect that before purchasing it she tried it on at the store and discovered no defects; that she wore it at a later date and did not discover the alleged defect, which was a cut or tear in the pocket in the skirt, until it was called to her attention when wearing it about a week later; that the only other defect was where the cloth had worn through at the slit in the side of the jacket.

The witness introduced by appellant who sold appellee the suit testified that it was in perfect condition

Appellee filed her statement of claim to the effect that she purchased of appellant on December 30, 1921, a two-piece ladies suit at the price of $35.00, which she paid; that appellant warranted the suit to be of first-class, good wearing material; that the suit was slap worn and defective and had been torn and mended; and that appellant refused after demand therefor to refund the purchase price.

Plaintiff testified that she had worn the garment on three different occasions before she made the first attempt to return it and to revoking the sale, and had worn it on nine or twelve different occasions before the trial, she was wearing it at the time of the trial and had no other garment to put on in case her offer to return the garment had been accepted.

Her testimony was to the effect that before purchasing it she tried it on at the store and discovered no defects; that she was 35 or a later date and did not discover the alleged defect, which was a cut or tear in the pocket in the skirt, until it was called to her attention when wearing it about a week later; that the only other defect was where the cloth had worn through at the slit in the side of the jacket.

The witness introduced by appellant who said

when purchased, and that the worn appearance was due to subsequent usage. Two other witnesses testified on behalf of appellant to the effect that the alleged defects were due to usage and not to a defect in the cloth of the suit.

The court found the issues for plaintiff and assessed her damages at the amount of said purchase price. Appellee has filed no brief in this court, but we think it clear there could be no recovery upon such evidence. By her continued acts of ownership she must be held to have ratified the sale and placed herself in a position where she could not rescind it. When goods have been delivered to a buyer and he does any act in relation to them inconsistent with the ownership of the seller, or when, after lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them he is deemed to have accepted the goods. (Uniform Sales Law, sec. 48.)

Besides there was no adequate proof of damages nor any proof of a warranty, as alleged.

Accordingly the judgment is reversed.

REVERSED.

Morrill and Gridley, JJ., concur.

when purchased, and that the usual expectation was due to him-
equivalent damage. The other witnesses testified on behalf of
plaintiff to the effect that the alleged defects were due to
usage and not to a defect in the plank of the mill.

The court found the issues for plaintiff and assessed
her damages at the amount of said purchase price. Appellee has
filed no brief in this court, but we think it clear there could
be no recovery upon such evidence. If the warranty was of
merchantability she must be held to have rejected the sale and placed
herself in a position where she could not revoke it. Then
goods have been delivered to a buyer and he does any act in
relation to them inconsistent with the ownership of the seller,
or does, after lapse of reasonable time, be retains the goods
without intimating to the seller that he has rejected them he
is deemed to have accepted the goods. (Uniform Sales Law,
Sec. 49.)

Besides there was no admissible proof of damages nor
any proof of a warranty, or breach.

Accordingly the judgment is reversed.

REVERSED.

Hewitt and Dailey, JJ., dissent.

274 - 27750

JAMES G. COLLINS,
Appellee,

vs.

J. G. CHAPLINE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in plaintiff's favor for $300 assessed as damages to his automobile as a result from its collision with one alleged to belong to defendant. The appeal is predicated upon the alleged failure to prove defendant's ownership as alleged.

The statement of claim is in two counts or paragraphs, the first charging driving of the automobile in a negligent manner, and the second, driving it at a reckless and excessive rate of speed. In each count it is charged that defendant by his servant and agent was driving "another automobile belonging to and possessed by the defendant." In his affidavit of merits defendant denied "driving a certain other automobile in a careless, negligent or improper manner," and denied that by reason of carelessness, etc. "the said automobile of the defendant * * * struck or collided with the said automobile of the plaintiff," and further denied that he or his servant "drove another certain automobile, belonging to and possessed by the defendant, at a reckless or excessive rate of speed, and denies by reason thereof the said automobile of the defendant * * * struck and collided," etc. The affidavit does not expressly deny defendant's ownership of the automobile but is in the form of a negative pregnant that carries with it

This appeal is from a judgment in plaintiff's favor for $500 sustained in damages to his automobile on a result from its collision with one alleged to belong to defendant. The appeal is predicated upon the alleged failure to prove defendant's ownership as alleged.

The statement of claim is in two counts or paragraphs, the first charging driving of the automobile in a negligent manner, and the second, driving it at a reckless and excessive rate of speed. In each count it is charged that defendant by his servant did cause and driving "another automobile belonging to and possessed by the defendant." In his affidavit of merits defendant denied "driving a certain other automobile in a careless, negligent or improper manner," and denied that by reason of carelessness, etc. "the said automobile of the defendant * * * struck or collided with the said automobile of the plaintiff," and further denied that he or his servant "have another certain automobile, belonging to and possessed by the defendant, at a reckless or excessive rate of speed, and leave by reason thereof the said automobile of the defendant * * * struck and collided," etc. The affidavit does not expressly deny defendant's ownership of the automobile but is in the form of a negative pregnant that matters we'll it

the implication or affirmation of such ownership. Being pregnant with that admission the pleading merely denied negligent driving and an excessive rate of speed.

This construction of the pleading was recognized in questions put by defendant's counsel in which he repeatedly referred to the automobile as "Mr. Chaplins's car." To be sure, he moved for a directed verdict at the close of plaintiff's case on the ground that there was no proof of defendant's ownership as alleged, but there being no denial of such ownership such proof was not required. The doctrine requiring specific denial of the allegation of ownership of the instrumentality causing injury, as laid down in Chicago Union Traction Co. v. Jerka, 227 Ill. 95, and Carlson v. Johnson, 263 id. 556, applies equally to the formation of issues in such a case under pleadings in the Municipal Court.

But after the adverse ruling of defendant's motion raising the issue whether such proof was necessary he did not stand by the same nor ask leave to amend his pleadings so as to put the fact of ownership in issue, nor did he renew the motion at the close of all the evidence and, therefore, abided by the ruling. (Bamberger-Stern Co. v. Anderson, 207 Ill. App. 222.)

Accordingly the judgment is affirmed and appellant will be taxed for the costs of the supplemental abstract.

AFFIRMED.

Morrill and Gridley, JJ., concur.

the justification or affirmation of such assertion. Being
property rule that maintains the identical property, making
negligent trifling and an excessive risk of injury.

This construction of the pleading was reversed and
in questions put by defendant's counsel in which he repeatedly
referred to the unfamiliar as "Mr. Dentinger's case." It is
true, as noted in a limited review of the claim of plaintiff
Gilly's case on the ground that there was no proof of defendant's
responsible in alleged, but there being no denial of such owners
duty also proof of a duty regulation. The instruction requiring
specific denial of the allegations of responsibility of the
instrumentality causing injury, as held upon in Dentinger Tolman
Distilling Co. v. Ingle, 17 Ind. App. 1, and Tolman v. Dinsmore,
Ind. 24, supra, applies equally to the issue of liability in
such a case under pleading in the controlled court.

In order for strict notice of defendant's service
filing the issue another well proof was necessary in it not
which by the case not any have to meet the question as to
to get the fact of ownership in issue, and of which the
making at the time of all the evidence was, therefore, offered
by the trial. Indianapolis Gas Co. v. Dentinger, 40 Ind.
App. 1.

Accordingly the judgment is reversed and cause
will be sent for the work of the supplemental opinion.

Affirm.

Barrett and Ingle, JJ., concur.

284 - 27760

MAY LENAHAN,
Appellee,

vs.

HYMAN WEINBERG,
Appellant.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

229 I.A. 608

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit for malicious prosecution. The declaration charged that without reasonable and probable cause defendant procured plaintiff's arrest on the charge of rioting, disorderly conduct and noises tending to a breach of the peace, and that upon trial of the charge she was acquitted. Defendant pleaded not guilty and appeals from a judgment against him for $700.

Defendant had obtained a permit from the City of Chicago to erect a building for a smelter on his property adjoining or near plaintiff's. She had refused to sign a petition for such permit and had been active with others in proceedings to enjoin erection of the building.

There were only two witnesses called for plaintiff, a policeman and herself. The policeman testified that at her request he went with her to defendant June 19, the day before her arrest, to see if he had a permit. Both said that there was no noise, threats or disturbance at that time. There was no contention on the part of defendant that there was. He claimed that the disturbance for which she was arrested took place after the policeman left. Whether there was a state of

facts justifying defendant in taking out a warrant against her rests wholly on the testimony given by plaintiff and defendant. He testified that in the previous March or April when he brought the first load to the premises, she came to the men and said: "We'll chase you out of here;" that on the day before her arrest she was swearing, cursing and calling him all kinds of names and said she would not let him get into the place; that she went to the bricklayers and said to them: "Get out of here, you Jews, or I will kill you;" that she started to 'holler' and break windows, and that thereupon the bricklayers stopped their work; that he then went out and called up his lawyer, Mr. Michal, and told him what had happened, and that his lawyer advised him to take out a warrant against her for making a disturbance. She did not deny his testimony as to what took place before that date but made a categorical denial of his testimony respecting the occurrences after the policeman left. His attorney, however, confirmed his testimony with respect to their interview and his advice. His testimony shows that defendant gave the same account of the occurrence to him that he testified to on the witness stand. He also testified that he went to plaintiff at defendant's request at a prior date on account of defendant's complaint of the trouble she gave him from day to day, and asked her why she was interfering with defendant's work for which he had a permit, and spoke to her of the impropriety of her previous conduct in calling him names. His testimony, which she did not deny, strongly tends to show not only previous complaints of disorderly conduct on her part but that she was continuing in such line of conduct thereby trying to prevent defendant's erection of the building even after she was advised he had a legal permit therefor. It is hardly probable that defendant would have felt compelled to seek legal advice again on the subject unless some-

Texas juvenile delinquent is taking on a serious aspect but
rests mainly on the testimony given by plaintiff and defendant.
He testified that in the previous March or April when he brought
the first load to the produce, she came to the door and said:
"We'll show you - out of here!" This as the top boards had arrived
she was swearing, cursing and calling him all kinds of names and
said she would not let him get into the place. That she went to
the brickyards and said to them: "Get out of here, you Joe,
or I will kill you;" that she started to 'bollow' and break
windows, and that thereupon the brickyards stopped their work;
that he then went out and called on his lawyer, Mr. Kinkel, and
told him what had happened, and that his lawyer advised him to
take out a warrant against her for making a disturbance. The
lad not deny his testimony as to what took place before that
time but made a conjectural denial of his testimony respecting
the conversation after the policeman left. His attorney,
however, confronted his testimony with records to their interview
and his advice. His testimony shows that defendant gave the
same account of the occurrence to him that he testified to on
the witness stand. He also testified that he went to plaintiff
at defendant's request at a prior date on account of defendant's
complaint of the trouble she gave him from day to day, and asked
her why she was interfering with defendant's work for which he
had a permit, and spoke to her of the impropriety of her continuing
conduct in calling him names. His testimony, which she did not
deny, strongly tends to show not only previous complaints of dis-
orderly conduct on her part but that she was continuing in such
line of conduct thereby trying to prevent defendant's erection
of the building even after she knew he had a legal permit
therefor. It is hardly probable that defendant would have left
his employing to seek legal advice again on the subject unless com-

thing of the nature he reported had occurred. It is neither probable nor plausible that he sought advice on a state of facts he knew did not exist. There is nothing in the record to indicate that his testimony is not as credible as hers. On the contrary, the testimony of his attorney and the attendant circumstances make it far more plausible. The onus was upon her "to show that the criminal prosecution was the offspring of malice and without any probable cause to justify it." (Israel v. Brooks, 23 Ill. 526; Glenn v. Lawrence, 200 Ill. 581.) Upon the facts as reported to his counsel, the latter's advice was justified, as was her arrest, and we are of the opinion that the circumstances and the testimony of defendant's counsel support defendant's version of the occurrences, and that the verdict was manifestly against the weight of the evidence. The judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Morrill and Gridley, JJ., concur.

delay of the mutuse be reported but concerned. It is neither probable nor plausible that he engage drive on a road of fresh [illegible] [illegible]. There is nothing in the record to indicate that his testimony is not as credible as hers. [illegible] history, the testimony of his wife-way and the witnesses sis-[illegible] made it far more plausible. The case was upon her [illegible] [illegible] the original proceedings was the offering of [illegible] [illegible] by [illegible] (Lucas v. [illegible], 32 III. 328; Ulmer v. [illegible], 200 III. 183.) Upon the facts as reported in his counsel, the Jailer's advice was justified; he was not aware, and on the of the opinion that the circumstances of the [illegible] of [illegible]'s [illegible] [illegible] of the [illegible], [illegible] the [illegible] [illegible] [illegible] the weight of the evidence. The judgment will be reversed with a finding of fact.

[illegible] with a finding of fact.

Reversed and finding, Mr. [illegible].

284 - 27760

FINDING OF FACTS.

We find that the arrest of appellee was without malice and not without reasonable and probable cause therefor.

301 - 27777

MILDRED B. KLAMAR,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee was a passenger on one of appellants' cars. She brought this suit to recover damages, charging in different forms that while she was about to alight from the car it was negligently started and moved, whereby she was thrown and injured. The appeal is from a judgment entered on a verdict in her favor for $1,000.

There was no question that the car had stopped for plaintiff to alight from it, and it is conceded that the main and controlling question of fact before the jury was whether it moved while she was alighting from it. Her case with respect to that question rests upon her solitary testimony. Against it is the clear, positive testimony of six witnesses, thus presenting for our consideration whether the verdict was not manifestly against the weight of the evidence. If it was it is the law of this State, too well established to require further discussion, as we have pointed out in Segal v. Chicago Ry. Co., 216 Ill. App. 11, that it is not a matter of discretion but a duty on our part to reverse the judgment with a finding of facts.

appeals was a passenger on one of respondents' cars. The brought suit suit to recover damages, claiming in different terms that while she was about to alight from the car it was negligently started and moved, throwing her to the ground and injuring. The record is that a judgment entered on a verdict in her favor for $1,000.

There was no question that she had suffered serious physically in alight from it, and it is conceded that the main and controlling question of fact before the jury was whether it moved while she was alighting from it. The case with respect to that question rests upon her unlikely testimony. against it is the clear, positive testimony of six witnesses, whose presenting for our consideration whether the verdict was not manifestly against the weight of the evidence. If it was it is the law of this state, too well established to require further discussion, so we have pointed out in Lampf v. Chicago Ry. Co., 210 Ill. App. 1, that it is not a matter of discretion but a duty on our part to reverse the judgment with a finding of facts.

That in this case the verdict was against a clear preponderance of the evidence is so obvious that it is difficult to understand how the jury reached its verdict or the court permitted it to stand. It was so clearly not the impartial, honest judgment of the jury, that it was the duty of the trial judge to set it aside. (Donelson v. East St. Louis Ry. Co., 238 Ill. 625, 628.) As he failed to do so the duty is cast upon us. It should not be necessary to repeat what was said in the Donelson case:

> "To permit a verdict which is clearly and manifestly against the weight of the evidence to stand, upon the supposition that the jury were impartial and honest, would be as unjust and injurious to the defeated party as though it proceeded from passion, prejudice or some improper motive." (628)

Nor need we discuss the scope or limitation of the rule that evidence is weighed and not counted. While the determination of the truth as to disputed facts does not generally or necessarily rest upon the number of witnesses testifying on one side of the case or the other with respect thereto, the element of numbers may become a controlling influence when their opportunity to observe the facts as to which they testify is equal and they stand upon an equal plane as to their credibility in other respects. (Hanley v. Chicago City Ry. Co., 180 Ill. App. 397, 403.)

In view of the other undisputed facts the case at bar turns upon the existence of a single fact, namely, whether in the interval after the car stopped and plaintiff fell the car moved. As against plaintiff's testimony that it did move defendants produced six witnesses who testified that it did not. We have carefully analyzed the entire testimony but

That is this case the verdict was against a clear preponderance of the evidence in an evidence case; it is difficult to understand how the jury reached its verdict or the court permitted it to stand. It was so clearly not the impartial, honest judgment of the jury, that it was the duty of the trial judge to set it aside. (Hawkins v. Blue Ridge Co., 90 Ga. App. 498.) He is faulted to do so the duty is cast upon us. It should not be necessary to repeat what was said in the Hawkins case:

> "To permit a verdict which is clearly and manifestly against the weight of the evidence to stand, upon the supposition that the jury were impartial and honest, would be to deprive one injured by the defaulted party as effectually as if prevented from instituting or prosecuting his suit by negligence or mere inertia." (498)

Nor need we discuss the scope or limitation of the rule that evidence is weighed and not counted. While the determination of the jury as to disputed facts does not generally be successfully put upon the question of witnesses testifying to see who of the two or the other side, respect therein, the element of numbers may tend to establish the testimony when there is reasonably to obtain the truth -- to wit: where they equally in equal and they stand upon an equal plane as to their credibility in other respects. (Hawkins v. Blue Ridge Co., 90 Ga. App. 498.)

In view of the above undisputed facts the case at bar turns upon the evidence of a single fact, namely, whether in the interval after the car stopped and plaintiff left the car [illegible] plaintiff's testimony that it did [illegible] defendants produced the witnesses who testified that it did not. The jury carefully analyzed the entire evidence but

find nothing therein that would justify the jury's exclusion of the testimony of these six witnesses and the acceptance of plaintiff's version of the accident. While plaintiff was manifestly an interested witness it cannot be said that any one of defendants' six witnesses was. While two of them were the motorman and conductor of the car they were not to be discredited merely because they were employed by the defendants. (Roberts v. Chicago City Ry. Co., 262 Ill. 228.) Even if they had a motive to misrepresent the facts there is no room in the record for ascribing such a motive to any of the other four witnesses, or to doubt that the six witnesses were in a position to observe the facts with respect to which they testified.

She alighted from the front exit of the car. Three of defendants' witnesses, the motorman, a policeman and a boy seventeen years old, were in the vestibule at the time she made her exit therefrom and observed her movements from the time the car stopped until she fell. Another witness was sitting on a railing at the curb, a few feet in front of her as she stepped from the exit, the door of which remained open until after her fall. Another witness sat in an automobile which he had driven up behind the car, but near the curb on that side of the street, where he was waiting for the car to start. As the car did not start on the signal of the conductor, the sixth witness, he looked out from behind the car to ascertain the cause of delay and saw plaintiff and others around her in the street. All testified that up to that time the car had not moved. All were in a position to know whether it did. They were in no way impeached and there is nothing in the record that reflects upon their veracity. Most of them testified that she fell or sat down about three feet from the

that evening towards that night, partly the jury's evaluation of the testimony of these six witnesses and the acceptance of plaintiff's version of the accident. While plaintiff was manifestly an interested witness it cannot be said that any one of defendants' six witnesses was. While one of them was the motorman and conductor of the car they were not so disassociated merely because they were employed by the defendants. (Moberg v. Chicago City Ry. Co., 200 Ill. App.) Even if they had a motive to misrepresent the facts there is no room in the record for ascribing such a motive to any of the other four witnesses, or to doubt that the six witnesses were in a position to observe the facts with respect to which they testified.

On alighted from the front exit of the car. There of defendants' witnesses, the motorman, a policeman and a boy seventeen years old, were in the vestibule at the time the car exit thereon and observed her movements from the time the car stopped until she fell. Another witness was sitting on a railing at the curb, a few feet in front of her as she stepped from the exit, the door of which remained open until after her fall. Another witness sat in an automobile which he had driven up behind the car, but near the curb on that side of the street, where he was waiting for the car to start. As the car did not stopt on the signal of the conductor, the auto witness, he looked out from behind the car to ascertain the cause of delay and saw plaintiff and others around her in the street. All testified that up to that time the car had not moved. All were in a position to know whether it did. They were in no way disconnected and there is nothing in the record that reflects upon their veracity. Most of them testified that she fell or sat down about three feet from the

car and had taken from one to three steps after she alighted from the car before she fell. Three of them noted that just before she fell her ankle turned or her leg twisted. She said at the time that she had "sprained her ankle," which the evidence tends to show was the real nature of her injury, something that might easily occur from various causes after she had left the car.

That the jury saw fit arbitrarily to accept plaintiff's version and disregard the testimony of defendants' six witnesses who were in no way impeached or discredited, and were all in a position to know the facts, and with the possible exception of the two employes had no apparent motive for testifying falsely in the matter, is difficult to reconcile with an honest and impartial consideration of the evidence.

While in view of the short interval of time between the stopping of the car and her falling to the pavement it may be said that plaintiff honestly believed her fall was in some way connected with her leaving the car, and hence she inferred it moved, yet as she was facing south away from the car she may have been easily mistaken, and her own testimony that after she fell she "was directly south of the door" tends to support defendants' theory that the car had not moved. We are impressed that her testimony reflects either a misapprehension of the real state of facts or a faulty recollection of them.

The judgment is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Morrill and Gridley, JJ., concur.

car and had taken from one to three scores after the injured from the car before she fell. Three of them noted that just before she fell her ankle turned or her leg twisted. The main at the time that she had "sprained her ankle," which the evidence bears to show was the real nature of her injury. something that might easily occur from various causes after she had left the car.

When the jury saw fit unfavorably to compare plaintiff's version of the accident with defendant's version, defendant's version was in no way improved or discounted, and there was still in a position to take the fright, and also the multiple exposition of the two employes had no apparent motive for benefiting falsely in the matter, it difficult to reconcile with an honest and impartial consideration of the evidence.

While in view of the short interval of time between the stopping of the car and her falling as the evidence is may be such that plaintiff honestly believed her fall was in some way occasioned also her leaving the car, yet when the interval is moved, yet as she was looking south away from the car she may have been easily mistaken, and her own testimony that after she fell she "was directly south of the door" tends to support defendants' theory that the car had not moved. We are impressed that her testimony reflects either a misapprehension of the real state of facts or a fanciful reconstruction of them.

The judgment is reversed with a finding of facts.

Mathews and Gridley, JJ., concur.

FINDING OF FACTS.

We find that when appellee alighted from the car in question it was standing still and that it did not start or move again until after appellee had stepped away therefrom and fallen on the pavement, and that appellants did not cause the car to start or move while she was in the act of alighting from it.

332 - 27808

ANTOINETTE C. DOUGLAS,
Appellee,

vs.

GEORGE F. HARDING, Jr.,
Appellant.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for personal injuries. From a judgment for $1000 in plaintiff's favor this appeal is taken.

Appellant was the lessor and appellee's husband a lessee of a flat in an apartment building, in the basement of which were storage rooms for the use of the tenants. The lease reserved to the lessor the basement for their common use.

The cause of the action in the original and first and second additional counts is predicated upon negligence of the landlord in permitting the floor of the basement to become slippery, whereby plaintiff slipped and was injured, the second additional count also charging that he suffered the floor of the basement to become in a bad state of repair, etc. The other three counts are predicated upon violation of certain ordinances of the City of Chicago; one upon an ordinance requiring a tenement house to be kept in good repair, clear and free from accumulations of dirt, etc.; one upon an ordinance requiring the owner to keep the same in a clean, wholesome condition, adequately lighted, ventilated, etc., and the other on an ordinance requiring the basement of a tenement house to have a basement floor of Portland cement of certain thickness, etc.

The evidence shows that plaintiff and another tenant, a Mrs. Kuntz, went into the basement on the afternoon of August 8, 1917, to go to their respective storage rooms; that in reaching them they walked around a space on the basement floor about two feet from the latter's room that was covered with what was variously described by them and another witness as "a pool of water," as "muddy," "lime damp," "a seepage condition," and as "water, slime and mud." As Mrs. Kuntz stepped through the door into her store room she was frightened by a rat and fell backwards in a sitting position across the threshold of the door, and plaintiff, who was just behind her, stepped back into the so-called water, slime or mud, and slipped and fell down therein, thereby causing the dislocation of one of her knee joints.

While one of the grounds urged for reversal is that upon such a state of facts the condition of the basement was not the proximate cause of her injury, we need not discuss that question, because, assuming that the condition of the basement was at the time as above described, there was no proof that the landlord had either actual or constructive notice of that fact without which there would be no liability. Assuming that the case comes within the operation of the rule referred to in Burke v. Kuletz, 216 Ill. 545, which imposes a duty upon the landlord to keep in repair portions of rented premises kept under his control and used by his several tenants, and that he is liable for injury occasioned by his negligence in failing to keep them in repair, yet as also said by the court in that case:

> "He can only be charged with negligence for such failure after notice of the existence of the dangerous condition of the same, or after the defect has continued for a sufficient length of time to charge him with constructive notice thereof." (549)

It was there said that the appellate court would have been justified in reversing the judgment on the conflicting

testimony on that point. But in the case at bar there was no evidence whatever tending to show actual notice to appellant of the existence of such a condition in the basement on or prior to the day of the accident, or that such condition existed for any particular length of time, whereby he might be charged with constructive notice thereof. For aught that appears such a condition might have resulted from a storm that very day or hour.

Hearing of the accident, which happened about two or three o'clock on August 8th, defendant's agent and manager together with his superintendent of the building visited it about two or three hours later and saw no water, mud or slime on the floor, nothing but a little moisture along the drain which sometimes came after a rain. Appellant had previously put in a so-called "McCann valve" in the sewer connection so that if the sewer failed to carry off water in time of a storm or rain and its contents backed up the trap would close the sewer until its contents or water receded. It thus appears that appellant took precautionary measures to prevent such a condition as testified to by plaintiff and Mrs. Kuntz, from whose testimony it might be inferred the condition complained of arose from the backing up of water in the sewer. Water sometimes came in from the open area in front of the basement door after a rain.

But if on the occasion in question the valve did not work and water backed up from the sewer into the basement causing the condition complained of, yet there is absolutely no evidence that appellant had any notice thereof, actual or constructive. While a discharged janitor testified for plaintiff that he was janitor at that time and for several months previous, and that he was discharged because he would not bail out water that came into the basement, and that such conditions existed on other

testimony on that point. But to the mind of her father, who no
doubtless (having lived in days of social order) is inclined to
of the existence of such a condition in the basement or
prior to the day of the accident, or that such condition existed
for any particular length of time, whereby he might be charged
with constructive notice thereof. For aught that appears such
a condition might have resulted from a storm that very day or
hour.

Hearing of the accident, which happened about two
or three o'clock on Friday afternoon, Mehrmann's uncle and another
together with his apprentaneous of the machine visited it about
six or three hours later and saw no water, was or alone on the
floor, writing but a little machine along the floor which some
times come after a storm. Upholstery and overlength was in a
so-called "safety value" in the power connection so that if the
water failed to carry off water in time of a storm or rain and
its condition backed up the trap would close the power until its
condition or water receded. It then appears that applicant took
precautionary measures to prevent such a condition as testified
to by plaintiff and Drs. Jungs, from ever happening it might be
believed the condition complained of arose from the backing up
of water in the sewer. Water undoubtedly came in from the open
area in front of the basement door after a rain.

But if on the contrary in question the valve did not
work and water backed up from the sewer into the basement causing
the condition complained of, yet there is absolutely no evidence
that applicant had any notice thereof, actual or constructive.
While a defendant may be liable for plaintiff's injuries he may
justifiably at that time and for several months afterward, and that
he was diligently because he could not hold his water that came
into the laundry, but that was caused plaintiff's injury as where

previous occasions, yet it appears conclusively, not only from his own but the testimony of plaintiff herself, that he was not janitor at the time, and he was absolutely discredited by the testimony of his superiors who were in a position to know the facts, and by other tenants who also had use of the basement and were frequently there. Their testimony was to the effect that they never saw any such conditions as described by said janitor or by plaintiff or Mrs. Kuntz, and that the basement was kept in a good condition.

As said in Payne v. Irvin, 144 Ill. 482, 489, the question whether the landlord was chargeable with notice of the condition of things he is bound to keep in a state of repair, is a question of fact for the jury. But in the case at bar there was no evidence as to notice for the consideration of the jury except what was in defendant's favor.

There was no evidence tending to support a violation of any of the ordinances pleaded or the count that the floor was in a bad state of repair, other than that of the discredited janitor. There was much testimony on that subject to the contrary. The building was only about four years old at the time of the accident and there had been no occasion to repair the concrete pavement.

There being no evidence whatever to support several of the counts, and the verdict being manifestly against the weight of the evidence with respect to the others, the judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Morrill and Gridley, JJ., concur.

previous occasions, yet it appears conclusively, not only from his own but the testimony of plaintiff herself, that he was not janitor at the time; and he was absolutely discredited by the testimony of his supervisors who were in a position to know the facts, and by other tenants who also had use of the basement and were frequently there. Their testimony was to the effect that they never saw any such conditions as described by said janitor or by plaintiff or Mrs. Hughes, and that the basement was kept in a good condition.

As said in Young v. Irwin, 144 Ill. 488, 489, the question whether the landlord was chargeable with notice of the condition of things he is bound to keep in a state of repair, is a question of fact for the jury. But in the case at bar there was no evidence as to notice for the consideration of the jury except that was in defendant's favor.

There was no evidence tending to support a violation of any of the ordinances pleaded or the court was the fact was in a bad state of repair, other than that of the dilapidated janitor. There was much testimony on that subject to the contrary. The building was only about four years old at the time of the accident and there had been no occasion to repair the exterior brownstone.

There being no evidence whatever to support averred of the counts, and the verdict being manifestly against the weight of the evidence with respect to the others, the judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Barrett and Friedly, J.J., concur.

FINDING OF FACTS.

We find that appellant did not suffer or permit the floor of the basement of the building in question to become slippery or in such a bad state of repair as to become dangerous for use of the tenants of said building, and did not permit the accumulation therein of dirt, filth, garbage or other similar matter, and did not inadequately light or ventilate the same, and conformed to the city ordinance with respect to laying a concrete floor in said basement, and that appellant exercised due diligence to keep said basement in a clean, wholesome and dry condition, and that he had no notice, actual or constructive, of any such condition of the basement as that charged in the declaration.

EXH - STAGE

LIABILITY OF STAGE.

It that that si-illnot dis ses wolves or pumals the floor of the basement or the building in question to tessed allgerty or in such a bad state of repair as to become dangerous for use of the tenants of said building, and did not provide the necessaiies necessary for light, fuel, gasoline or other similar motive, and did not immediately light or ventilate the same, nor contribute to the city expenses with respect to laying a concrete floor in said basement, and that plaintiff exercised due diligence to keep said basement in a clean, sanitarium and dry condition, and that he had no notice, actual or constructive, of any such condition of the basement as this charged in the testimonies.

268 - 27744

J. A. SMITH,
Appellee,

vs.

PRESSED STEEL EQUIPMENT COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $800, rendered against defendant by the Municipal Court of Chicago, in an action of the fourth class in contract, wherein plaintiff sought to recover the sum of $800, being the balance due for the making, at the agreed price of $1600, of four machines used for the manufacture of certain so-called "dust guards" for journal boxes.

Defendant filed an affidavit of defense and also a claim of set-off for the recovery back of the $800 which it had paid plaintiff on account. Its defense was in substance that plaintiff represented that the machines when made would each have the capacity of producing 7500 guards per day of eight hours; that after plaintiff had made two of the machines, it was found that neither had that capacity, and that some of the guards, manufactured therefrom, wrinkled; that, upon plaintiff's further representations that this wrinkling could be remedied and that the other two machines when made would have said capacity, defendant paid plaintiff $800, and ordered him to make the other two machines; that these machines did not have said capacity; and that none of the machines was ever delivered to defendant.

The cause was tried before a jury. Plaintiff and three witnesses in his behalf testified, and plaintiff introduced many letters which passed between the parties. Plaintiff's evidence tended to show that, while the original agreement between the parties was that the machines when made would each have said capacity and that all showed a somewhat lesser capacity, defendant, after two of the machines had been made and were found to have such lesser capacity, waived the particular requirement, caused plaintiff to manufacture many guards from said two machines, which guards were used by it, and ordered plaintiff to make the other two machines, which he did; that thereafter defendant ordered plaintiff to manufacture guards from said machines, and plaintiff, upon its orders, manufactured thousands of such guards for its customers; and that the understanding was that said machines when made, and after the purchase price of $1,600 had been paid, would remain in plaintiff's possession, and that plaintiff should manufacture guards therefrom as ordered by defendant.

At the conclusion of plaintiff's evidence, and after defendant's attorney had moved for a directed verdict in its favor, the court, on plaintiff's motion, allowed him over defendant's objection to amend his statement of claim on its face and allege a waiver of the original stipulation as to the capacity of the machines. Defendant here complains of the court's action in that regard. It was within the court's discretion and was proper. (Chap. 7, Sec. 1, Cahill's Stat; Lunkes v. Gluljich, 182 Ill. App. 116.)

We have carefully reviewed the entire evidence, including the testimony of D. M. Bell, president of defendant, who was the only witness called by it, and cannot say that the verdict is against the weight of the evidence, as urged. And

The cause was tried before a jury. Plaintiff and three witnesses in his behalf testified, and plaintiff introduced many letters which passed between the parties. Plaintiff's evidence tended to show that, while the original agreement between the parties was that the machines when made would each have said capacity and that all showed a considerable lesser capacity, defendant, after two of the machines had been made and were found to have such lesser capacity, waived the particular requirement, caused plaintiff to manufacture many pounds from said two machines, which pounds were used by it, and ordered plaintiff to make the other two machines, which he did; that thereafter defendant ordered plaintiff to manufacture pounds from said machines, and plaintiff, upon its account, manufactured thousands of such pounds for its customers; and that the understanding was that settlements when made, and after the purchase price of $1,000 had been paid, would remain in plaintiff's possession, and that plaintiff should manufacture pounds therefrom as ordered by defendant.

At the conclusion of plaintiff's evidence, and after defendant's attorney had moved for a directed verdict in its favor, the court, on plaintiff's motion, allowed him over defendant's objection to amend his statement of claim on its face and allege a waiver of the original stipulation as to the capacity of the machines. Defendant here complains of the court's action in that regard. It was within the court's discretion and was proper (Chap. 7, sec. 1, Cahill's Ill. Stat; Moore v. Gentling, 249 Ill. App. 124.)

We have carefully perused the entire evidence, including the testimony of R. M. Doll, president of defendant, who was the only witness called by it, and cannot say that the verdict is against the weight of the evidence, as urged. The

it is clear to us that the original stipulation as to the capacity of each machine was waived by defendant, and that a delivery of the four machines to defendant prior to the payment of the balance of the purchase price was not intended. (Loftus v. Behrens, 187 Ill. App. 598.)

Complaint is made of certain statements in the court's charge to the jury. We have read the charge and think that the jury was fairly and properly instructed. Furthermore, it appears that defendant's attorney at the conclusion of the charge only made a general objection thereto, without pointing out specifically the portions of the charge objected to. This is not sufficient.(Pecarare v. Halberg, 246 Ill. 95, 97.)

The judgment should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

290 - 27786

J. MEHLMAN,
Appellee,

vs.

A. A. CARLSON,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

223 I.A. 609

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer, commenced October 1, 1921, wherein plaintiff claimed that he was entitled to the possession of certain premises in the city of Chicago, described as "second flat of building situated at No. 702, A., Barry Avenue," and that defendant, A. A. Carlson, unlawfully withheld possession from him. The cause was tried without a jury on October 11, 1921, resulting in the court finding defendant guilty, and entering judgment on the same day that plaintiff recover from defendant the possession of the premises and that a writ of restitution issue.

It was disclosed by the testimony of defendant, called as plaintiff's witness, that in the year 1919, he leased the premises, by written lease from one M. W. Croxton, for a period of two years, from October 1, 1919 to September 30, 1921, at a monthly rental of $52.50; that he took possession under the lease; and that he still had possession at the time the action was commenced and at the time of the trial. This lease, signed by defendant and also signed "M. W. Croxton, by Strasheim & Co., Agts.," was admitted in evidence. Plaintiff's attorney thereupon offered an instrument purporting to be a written lease of the same premises to J. Mehlman, for a period of one year, from October 1, 1921 to September 30, 1922, at a

monthly rental of $90, signed "J. Bohlman" and also signed "H. W. Croxton, by Croxton, Schneider & Co., Agents." Defendant's objection to the introduction of this instrument was overruled by the court and the same was admitted. The above appears to be all the evidence introduced on the trial.

Defendant seeks by this appeal to reverse the judgment. No brief has been filed in this appellate court by plaintiff. We are of the opinion that the court erred in admitting over defendant's objection the instrument in evidence. No attempt was made to prove the genuineness of the signatures thereon, or that the agents who apparently signed the instrument had authority so to do, or that the purported lessor named therein was the same person from whom defendant had received his lease. And we think that the court erred in entering the judgment. The evidence was insufficient to show plaintiff's right to the possession of the premises. The burden of so showing was upon him. (Fitzgerald v. Quinn, 165 Ill. 354, 366.) While it appears from the lease to defendant that its term expired on September 30, 1921, and that he was in possession of the premises on October 1st, when plaintiff's action was commenced, plaintiff was required to show a right of possession in himself and could not rely on any lack of right in defendant whom he sought to dispossess. (Fitzgerald v. Quinn, supra.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Morrill, J., concur.

[illegible] notice of 600, signed "J. Brahmer" and also signed "E. A. Gretchen, by Gretchen, [illegible]." Defendant's [illegible] in the [illegible] of this [illegible] by the court and the case [illegible]. The [illegible] is in all the evidence [illegible] in the record.

Defendant argues in his behalf to secure the judgment. He brief has been filed in his behalf [illegible] plaintiff. In one of the opinion that the [illegible] in one [illegible] over defendant's objection the [illegible] in evidence. He attempt was made to prove the genuineness of the signature [illegible]. Or that he speaks the [illegible] signature the defendant had authority to do so, or that the purported letter [illegible] Despite the [illegible] before Tiny [illegible] [illegible] his [illegible]. And to which that the court erred in [illegible] the judgment. The evidence was insufficient to show plaintiff's rights to the possession of the property. The [illegible] of [illegible] [illegible] upon him. (Blanchard v. [illegible], 110 [illegible], 489, 490.) While it appears from the [illegible] that [illegible] been signed on September 30, 1922, and that he had in possession of the property on October 1st, when plaintiff's action was commenced, plaintiff [illegible] in that [illegible] of possession [illegible] in himself and only by an act [illegible] of right [illegible] when he sought to dispossess. (Blanchard v. [illegible], [illegible].)

The judgment is reversed and the cause remanded.

[illegible] and [illegible].

Taylor, C. J., and Morrill, J., concur.

313 - 27789

FEDER'S DEPARTMENT STORE, a corporation, Appellee, vs. HARRY GOLDMAN, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In this contract action for the recovery of money, commenced March 15, 1921, the court, on January 6, 1922, ordered that defendant's second amended affidavit of merits to plaintiff's statement of claim be stricken from the files, that defendant be defaulted for want of a sufficient affidavit of merits, and that judgment be entered against him for $998, the principal sum claimed to be due by plaintiff. Defendant appealed.

In plaintiff's statement of claim it is alleged that its claim is for rent due from February 15, 1920, to February 15, 1921, in the sum of $1500, upon which there has been paid $502, leaving a balance of $998, together with interest; that said claim is based upon a written instrument (copy attached); that plaintiff rendered to defendant a statement showing such balance; and that defendant did not, within one week after such balance due was determined by plaintiff, pay the same or any part thereof.

The written instrument referred to is dated February 5, 1920, and is signed by plaintiff as first party, and by defendant as second party. It is therein stated that plaintiff has leased to defendant, from February 19, 1920, until March 31, 1922, the premises in Chicago "on the first floor of building," occupied and used by plaintiff as a

department store at 1378-80 Milwaukee Avenue, the space being indicated on a plat attached, and "said department to be used for the display and sale of jewelry, whether real or imitation, and all articles mounted with gold, silver or platinum, or plated with any or all of the above metals, all silverware, copperware and all glassware." The plaintiff "agrees that, at all reasonable business hours, whenever it furnishes heat and light to the other part of said department store, it will furnish heat and light to the space hereby leased." The defendant agrees to pay rent as follows: "The first party (plaintiff) shall deduct from the total receipts of said jewelry department a sum equal to 12-1/2% of the gross sales until said gross sales reach $10,000 in any one year, and thereafter shall deduct 10% of the amount of gross sales in excess of $10,000, a complete statement to be made by the first party on each Monday for the sales of the previous week. * * In the event that on February 15, 1921, the amount received hereunder by the first party as rent shall not equal $1,500, the second party (defendant) agrees to make up the deficiency so as to make the rent $1,500, said deficiency to be paid within one week after the same has been determined by the first party." There are provisions regarding the installation of show cases and counters and their removal by defendant upon the termination of the lease, the free access of plaintiff to the premises leased, and as to defendant keeping the premises in accordance with the laws of the State and the ordinances of the city. And it is agreed that, in case of a violation of any of the provisions of the lease plaintiff may cancel the rights of defendant upon 5 days' written notice, at the expiration of which plaintiff may remove any of defendant's merchandise from the space and place it in storage at defendant's expense.

department store at 5175-55 Kalamazoo Street, the store being
illuminated on a plot adjacent, and "that Defendant is in need
for the display and sale of jewelry, clothing and accessories,
and all articles customarily sold, worn or displayed, or
placed with any or all of the above merchandise, all fixtures,
equipment and all plaintiff." The PLAINTIFF argues that,
at all reasonable business hours, whenever it furnishes heat
and light to the owner part of said department store, it will
furnish heat and light to the above jewelry issued." The defend-
ant argues to pay rent as follows: "The first party (plaintiff)
shall deduct from the total receipts of said jewelry department
a sum equal to 12-1/2% of the gross sales until said gross sales
reach $50,000 in any one year, and thereafter shall deduct 10%
of the amount of gross sales in excess of $50,000, a complete
statement to be made by the first party on each Monday for the
sales of the previous week. * * In the event that on January
15, 1952, the amount received determined by the first party as
rent shall not equal $1,800, the second party (defendant) agrees
to make up the difference so as to make the rent $1,800, said
difference to be paid within one week after the same has been
determined by the first party." There are pertinent provisions
the installation of show cases and counters and their removal
by defendant upon the termination of the lease, the free access
of plaintiff to the premises leased, and as to defendant keeping
the premises in accordance with the laws of the state and the
ordinances of the city. And it is argued that, in case of a
violation of any of the provisions of the lease plaintiff may
assert the rights of defendant upon 5 days' written notice,
at the expiration of which plaintiff may remove any of defend-
ant's merchandise from the premises and that it is entitled to
defendant's expense.

In defendant's said affidavit of merits he admitted that he signed the written instrument, and alleged that plaintiff's department store was a small one, 75 by 100 feet, on the main floor of the premises; that for a period of two weeks after he had moved into the store plaintiff "abolished and removed its jewelry department in said store, thereby giving this defendant the exclusive right to sell articles of jewelry, etc., as mentioned in said contract, but that upon the expiration of said two weeks, the plaintiff, contrary to and in violation of the terms of the contract and agreements entered into between the parties hereto, re-established and maintained its jewelry department, immediately across the aisle of defendant's jewelry department, and sold and displayed articles of jewelry * * and silverware, copperware and glassware, in large quantities, in competition with this defendant, to his loss, detriment and damage, in a sum far in excess of plaintiff's claim." Defendant further alleged that "contrary to and in violation of the terms of the contract above mentioned plaintiff failed and wilfully refused to furnish this defendant with proper lighting; that plaintiff and its agents would time and again turn off lights in defendant's department and would remove the electric light globes, leaving defendant's section in almost total darkness and making it impossible to conduct his business in plaintiff's store on a profitable basis."

Counsel for defendant contends that the amended affidavit of merits discloses a good defense to plaintiff's claim, and that the court erred in striking it from the files and entering the judgment appealed from. He first urges that the affidavit discloses in substance that when, after defendant became a tenant of the premises, plaintiff removed its jewelry department from the store, it thereby gave him the exclusive right to sell articles of jewelry, etc., in the store, and that

In determining such criticism of matters he considered that Mr. Edgard the written instrument, and alleges that plaintiff's department store was a small one, if by fact, on the main floor of the premises; that for a period of two years after he had moved into the store plaintiff "abolished and removed the jewelry department in his store. Shortly after the defendant [illegible] the exclusive right in all articles of jewelry, etc., so specified in said contract, but that some the [illegible] of said [illegible] the right, plaintiff, contrary to and in violation of the terms of the contract and agreements entered into between the parties hereto, [illegible] and [illegible] for jewelry [illegible] purchase, immediately [illegible] the right of plaintiff's jewelry department, and sold and displayed articles of jewelry [illegible] and silverware, cut-glass and glassware, in large quantity, in competition with this defendant, to his loss, detriment and damage, in a sum far in excess of plaintiff's claim." [illegible] not further alleged that "contrary to and in violation of the terms of the [illegible] plaintiff [illegible] allowed or failed to [illegible] with [illegible] that plaintiff and the [illegible] and again [illegible] all lights in defendant's department and would remove the electric light globes, leaving defendant's section in almost total darkness and making it impossible to conduct his business in plaintiff's store on a profitable basis."

Counsel for defendant contends that the [illegible] affidavit of merits discloses a good defense to plaintiff's claim, and that the court erred in striking it from the files and entering the judgment appealed from. He first argues that the affidavit discloses he entered into [illegible] about [illegible] because a lease of the premises, plaintiff removed its jewelry department from the store, it thereby gave him the exclusive right to sell articles of jewelry, etc., in the store, and that [illegible]

when, after a lapse of two weeks, it re-established and maintained its said jewelry department in competition with defendant's business, plaintiff was guilty of a violation of the terms of the lease. In our opinion the contention is without merit. The statements, contained in defendant's said affidavit and above italicized, are mere conclusions. We fail to find any allegations in the lease, even suggestive that defendant, by becoming a tenant of the space, was to be given the exclusive right of selling articles of jewelry, etc. in the store. The language of the lease is plain and unambiguous, and proof aliunde cannot be heard to contradict or vary its terms, or give it a meaning inconsistent with the language used. (Auditorium Association v. Fine Arts Building, 244 Ill. 532, 538.) And the mere fact that, after defendant became a tenant in the store, plaintiff ceased operating a jewelry department therein and in two weeks re-established its said department therein, does not show an intention on the part of plaintiff to give defendant such exclusive right.

Counsel for defendant also contends that the affidavit of merits discloses a good defense to the payment of the rent because it alleges that, in violation of the terms of the lease, plaintiff failed and refused to furnish defendant with "proper" lighting, etc. Plaintiff only agreed that "at all reasonable business hours, whenever it furnishes heat and light to the other part of said department store, it will furnish heat and light to the space hereby leased." It is not alleged in the affidavit that plaintiff did not comply with this agreement. Counsel's contention seems to be based on the theory of a constructive eviction, thereby justifying defendant in refusing to pay the rent, but it is well settled that "if the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent, if he

than, after a lapse of two weeks, it reestablished and maintained its said jewelry department in competition with defendant's business, plaintiff was guilty of a violation of the terms of the lease. In our opinion the contention is without merit. The statements, contained in defendant's said affidavit and above italicized, are mere conclusions; we fail to find any allegations in the lease, even suggesting that defendant, by becoming a tenant of the space, was to be given the exclusive right of selling articles of jewelry, etc. in the store. The language of the lease is plain and unambiguous, and parol evidence cannot be heard to contradict or vary its terms, or give it a meaning inconsistent with the language used. (Armstrong [illegible] v. Illinois Building, 244 Ill. 332, 338.) And the mere fact that, after defendant became a tenant in the store, plaintiff quit operating a jewelry department therein and in two weeks re-established its said department therein, does not show an intention on the part of plaintiff to give defendant such exclusive right.

Counsel for defendant also contends that the affidavit of merits discloses a good defense to the payment of the rent because it alleges that, in violation of the terms of the lease, plaintiff failed and refused to furnish defendant with "proper" lighting, etc. Plaintiff only agreed that "at all reasonable business hours, whenever it furnishes heat and light to the other part of said department store, it will furnish heat and light to the space hereby leased." It is not alleged in the affidavit that plaintiff did not comply with this agreement. Counsel's contention seems to be based on the theory of a constructive eviction, thereby justifying defendant in refusing to pay the rent, but it is well settled that "if the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of

continues to occupy the premises; unless he abandons the premises, his obligation to pay rent remains". (Keating v. Springer, 146 Ill. 481, 495; Barrett v. Boddie, 158 Ill. 479, 484.) There is no suggestion in the affidavit that defendant was not occupying the space as a tenant for the period for which plaintiff sues.

Our conclusion is that the court was fully warranted in striking the affidavit from the files on the ground that it did not show a good defense to plaintiff's action, and in entering the judgment. Accordingly, the judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

[illegible] to study the problem only after determine the problem, the obligations to pay such remedies". (Phillips v. Tolleson, 108 Ill. App. 4th, 1st; Duffield v. Phelps, 108 Ill. App. 4th, 4th.) There is no exception in the statutes that determines when an employee the means to a remedy for the period for which plaintiff seeks.

Our conclusion is that the court was fully warranted in entering the judgment from the fines on the ground that it did not show a good defense to plaintiff's action, and in entering the judgment. Accordingly, the judgment will be affirmed.

AFFIRMED.

Summer, P. J., and Dorothy, J., concur.

325 - 27801

EDWARD KAHN,
Appellee,

vs.

WILLIAM BUCKLEY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer, commenced October 7, 1921, to recover possession of certain premises, viz: the "second floor of building known as No. 149 La Vergne Avenue," in the City of Chicago, alleged to be unlawfully withheld from plaintiff. On the trial without a jury the court found defendant guilty, and on October 13, 1921, entered judgment that plaintiff recover the possession and that a writ of restitution issue.

It appears that plaintiff leased the premises by written lease, expiring September 30, 1921, to defendant, who remained in possession after the end of the term and was in possession on October 3, 1921, when he received a letter written by plaintiff's attorneys under plaintiff's authority. Defendant contended on the trial that this letter created a tenancy from month to month, requiring a 60 days' notice to terminate, but the court decided to the contrary, entered the judgment appealed from, and allowed defendant 60 days from October 13, 1921, within which to file his bill of exceptions, which bill was not filed until December 13, 1921, 61 days thereafter.

After the cause had been docketed in this appellate court, plaintiff moved to strike the bill of exceptions from the transcript and to affirm the judgment. On June 26, 1922,

the motion to strike was allowed, but the motion to affirm was reserved to the hearing. We find no error in the common law record, and, although not properly before us, have examined the bill of exceptions, and are of the opinion that there is no merit in defendant's contention made in the trial court and here again urged. Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

the matter of course was allowed, but the decision is little
was reversed in the Decision. He did be court in the Second
law review, and, although not directly before us, have standard
the size of exceptions, and one of the suggestion that there is
no merit in defendant's contention made in the trial court
and have again urged. Accordingly, the judgment of the
Supreme Court is affirmed.

LEVINSON.

Jacobs, J., Z., and Schreiber, J., dissent.

271 - 27747

ANKRUM ADVERTISING AGENCY, a corporation, Appellee, vs. SAMUEL BLOOMFIELD, ALBERT BLOOMFIELD and NATHAN BLOOMFIELD, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in the Municipal Court of Chicago upon a verdict in favor of plaintiff, who is appellee here, for $4,191.48 and costs of suit. Defendants' appealed after motions for a new trial and in arrest of judgment had been denied. The suit was brought originally against the defendants Samuel and Albert Bloomfield, but subsequently Economy Tire and Rubber Company, a corporation. Durable Tire and Rubber Company, a corporation, Union Rubber Company, a corporation, and Nathan Bloomfield were made defendants. The amended statement of claim averred that at the special instance and request of these defendants, certain services were rendered, at an agreed price, and money expended for advertising to the aggregate amount of $3920.78, and that there was an account stated between the parties on July 1, 1920. With the exception of the Union Rubber Company, all of the defendants answered denying the existence of any contract or agreement with plaintiff and specially denying the joint liability to plaintiff of each of said defendants with any one or more of the defendants. Just before the case was reached for trial, the plaintiff took a non-suit as to the defendants Economy Tire and Rubber Company, Durable Tire

and Rubber Company and Union Rubber Company, and judgment for costs was entered against the plaintiff in favor of each of these defendants. Thereafter, without further amendment or change in the pleadings and the issues, the court proceeded with the trial.

It is urged by appellants that the action being against three defendants jointly, no recovery can be had unless the proof shows liability against all the persons joined as defendants. Lodge A. O. U. W. v. Buhlke, 129 Ill. 298; Imperial Hotel Co. v. Clafflin Co., 175 id. 119; Powell Co. v. Finn, 198 id. 567. The record shows no evidence tending to connect Albert Bloomfield, who was one of the defendants, with the orders for the advertising alleged to have been given, with the single exception of certain statements and declarations made by the defendants Samuel and Nathan Bloomfield. These declarations cannot be regarded as sufficient to prove that Albert Bloomfield was a partner with them, unless the statements were made in his presence or authorized by him or thereafter adopted or ratified. Conlan v. Mead, 172 Ill. 13; Gordon v. Bankhard, 37 id. 147. These propositions seem to be admitted by counsel for appellee, who contend that the existence of a partnership is a question of fact, citing Field v. Crawford, 146 id. 136; Fitch v. King, 279 id. 162. This may be conceded without affecting the force of appellants' argument above stated.

Appellee also contends that a partnership may be created by construction of law as to third persons, although neither intended nor actually existing between the parties themselves. This rule does not in any way controvert the proposition for which appellee contends. It is held in the

and Luther Company and Chase Luther Company, and judgment for costs was entered against the plaintiff in favor of each of these defendants. Thereafter, without further amendment or change in the pleadings and the issues, the court proceeded with the trial.

It is urged by appellants that the action being solely these defendants jointly, as evidenced on the face of the pleadings, the trial court lacked authority to try the issues joined as between the plaintiff and the joining defendants. Long v. C. F. G. v. Smith, 114 Ill. App. Imperial Hotel Co. v. Chatham Co., 275 Ill. 129; Powell Co. v. Ellis, 255 Ill. 629. The record shows no evidence tending to connect Albert Blumfield, who was one of the defendants, at the time of the alleged conspiracy, with the acts given, with the single exception of certain statements and declarations made by the defendants Samuel and Joshua Blumfield. These declarations cannot be regarded as sufficient to prove that Albert Blumfield was a partner with them, unless the statements were made in his presence or authorized by him or thereafter adopted or ratified. Cooley v. Ward, 171 Ill. 519; Bailey v. Hamilton, 97 Ill. 147. These propositions seem to be admitted by counsel for appellee, who contend that the existence of a partnership is a question of fact, citing Ziegler v. Greenhut, 248 Ill. 138; Kirby v. Ellis, 249 Ill. 328. This may be conceded without affecting the force of appellants' argument where stated.

Appellee also contends that a partnership may be created by mutual acts of its so-to-be partners, although neither intended nor consciously entered into the partnership relation. This rule does not in any way contravene the proposition for which appellee contends. It is held in the

case of Daugherty v. Heckard, 189 Ill. 239, cited by appellee, that declarations of any alleged co-partners tending to establish the existence of a partnership are admissible against the party making them and against any other alleged partner who was present. This authority clearly sustains the proposition for which appellee contends, as Albert Bloomfield was not present at the time the alleged statements and declarations were made by his co-defendants Samuel and Nathan Bloomfield. It is obvious that the judgment cannot be allowed to stand against the three defendants whose joint liability has not been proven, nor upon the statement of claim without amendment. Under these circumstances, it is unnecessary to review the evidence in the case or to discuss other questions covered by the briefs of counsel.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

case of *Jacobellis* v. *Ohio*, 378 U.S. 184, cited by appellant, that restrictions of any alleged constitutional rights in relation to activities the relations of a pictorially are substantially imposed the policy making time and exclusive for a more alleged freedom one was present. This substantially constitutes the constitution for which appellant argues, in fact, Plaintiffs's was not present at the time the alleged statements and depositions were made by his co-defendants Jones and Brown-Williams. It is obvious that the judgment cannot be allowed to stand against the Ohio criminal obscenity statutes which have not been proven, nor plain the statement of claim against defendants. Thus, these criminal, it is necessarily to refuse the "violence" in the sense or in violence which constitutes protected by the totality of concerns.

The judgment of the municipal court is reversed and the cause remanded.

Reversed and remanded.

Duncan, P. J., and Shelley, J., concur.

294 - 27770

RALEIGH MANUFACTURING COMPANY,
a corporation,
Appellee,

vs.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment by the Circuit Court of Cook County in favor of appellee in an action of replevin brought to recover 244,106 pounds of brass rods. The record shows that under the replevin writ, 122,618 pounds of the merchandise in question was recovered and the writ was returned. There was a jury trial resulting in a verdict finding the issues for plaintiff and the right of possession of the property in plaintiff, upon which judgment was entered.

The subject-matter of this suit is identical with that involved in case number 27769, in which an opinion has been this day filed. The issues in both cases are identical and the evidence substantially the same. The two cases were consolidated by stipulation and tried at one time by the same jury, who, by agreement, were directed to and did return separate verdicts.

All questions involved in the present appeal were decided in our opinion filed in case number 27769, and for that reason no further discussion of the law and evidence involved herein is necessary.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

No. 27176

BOARD OF ADJUSTMENT OF DENVER,
a corporation,
Appellee,

vs.

CHICAGO, MILWAUKEE & PACIFIC
RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM
DENVER COUNTY CO
DISTRICT COURT.

MR. JUSTICE BOUCHER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the District Court of Denver County in favor of appellee in an action of replevin brought to recover 564,000 pounds of brass rods. The record shows that under the replevin writ, 540,612 pounds of the merchandise in question was recovered and the writ was returned. There was a jury trial resulting in a verdict finding the issues for plaintiff and the right of possession of the property in plaintiff, upon which judgment was entered.

The multifarious nature of this suit is indicated with that involved in case number 27169, in which an opinion has been this day filed. The issues in both cases are identical and the evidence substantially the same. For the reasons more considered by stipulation and noted at sum time by the case jury, who, by agreement, were directed to and did render separate verdicts.

All questions involved in the present appeal were decided in our opinion filed in case number 27169, and for that reason no further discussion of the law and evidence involved herein is necessary.

The judgment of the District Court is affirmed.

AFFIRMED.

307 - 27783

D. S. NOCHLAN,
Appellee,

vs.

SAM COHEN, GEORGE COHEN and H. J. E. COHEN, doing business as Sam Cohen & Sons,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court upon a verdict in favor of appellee, who was plaintiff below, in the sum of $1,000 and costs. The action was in assumpsit upon a promissory note. The statement of claim alleged the execution and delivery by defendants of their promissory note for $1,000, dated May 19, 1920, payable to one H. Galowich, and the endorsement thereof by payee. A copy of the note and its endorsement was attached. Defendants' amended affidavit of merits set forth the execution and delivery of the note to the payee as part payment for certain merchandise and that the same is unpaid, payment being refused on account of the inferiority of the merchandise purchased, and further alleged that plaintiff was not a holder for value of said note, but was the agent for and on behalf of the payee.

Appellants urge as grounds for reversal that the statement of claim failed to show a legal liability on the part of defendants to plaintiff and cite in support of their proposition sundry cases in the reviewing courts of this state in actions of tort, in which judgments have been reversed on account of the failure of the declaration or statement of claim to show the nature of the tort complained of.

Appellants also contend that in an action upon a promissory note plaintiff must plead facts disclosing some right in himself entitling him to maintain his action. Appellants argue that there was nothing before the court to show that plaintiff was either the owner or holder of the note, citing, in support of their contention, Macrae v. Krier, 211 Ill. App. 405, in which it was held that an action on a promissory note must be brought in the name of the holder of the legal title. This is conceded. Appellants also cite Trude v. Fulton, 207 Ill. App. 216, holding that the legal holder and owner of notes may bring an action thereon in his own name, although the proceeds belong to another person. The other cases cited by appellants are in foreign states, whose statutory provisions are not shown. These decisions indicate that an endorsement on the part of the payee must be shown, which was done in the case at bar.

It is sufficient if the statement of claim apprises defendant of the nature of the demand against him and gives the information necessary to inform defendant as to the nature of the case. Isbitz v. Chicago City Ry. Co., 192 Ill. App. 487; Scelten v. Crist, 210 id. 62. It was held in Flew v. Beard, 274 Ill. 234, that "after judgment, the rule by which pleadings before judgment are construed most strongly against the pleader is reversed and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment (citing authorities). If the statement of claim filed in this cause stated a cause of action, however defectively or imperfectly, and the issue joined was such as necessarily would require proof of the facts defectively stated, it would be sufficient." This rule has been sustained in numerous instances

and the authorities upon the subject were reviewed in Matot v. Barnheisel, 216 Ill. App. 366.

The affidavit of merits admitted the execution and delivery of the note and its non-payment. If there was any defect in the statement of claim, it was aided by the answer of defendants, who were fully apprised as to the nature of the demand against them. Lyons v. Kanter, 285 Ill. 336. As was said in Thomas v. Neuhlmann, 92 Ill. App. 573, "It seems too plain to require the citation of authority to establish the proposition that any plea to a declaration which fails to state a cause of action can supply such a defect." (Citing authorities.)

In the case at bar, the statement of claim contained allegations showing the making, the execution, delivery, consideration and a general description of the note, the endorsement thereof by the payee and the right of plaintiff to sue as the holder and owner of the note. The mere fact that plaintiff's name appeared as an endorser on the back of the note was immaterial. Henderson v. Davidson, 157 Ill. 379. Possession of a negotiable note is prima facie evidence of ownership by the possessor.

No other grounds for reversal are presented by appellants, and it must be presumed that the judgment of the Municipal Court was regular and supported by the evidence and warranted by the pleadings unless the contrary appears affirmatively.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

and the authorities upon the subject were reviewed in Lynch v. Commissioner, 329 U.S. 313, 320-326.

The difficulty of merely sketching the evolution and history of the state and its corporations. If there was any defect in the statement of claim, it was cured by the answer of defendants, who were fully apprised as to the nature of the second equitable issue. Lemon v. Langley, 329 U.S. 326. As was said in Lynch v. Commissioner, 329 U.S. 313, 320, "It seems the point is merely the definition of authority to establish the conditions that are part of a declaration which gives rise to a cause of action and supply such a cause." (Citing authorities.)

In the case at bar, the statement of claim contained allegations showing the nature, the creation, history, consideration and a general description of the note, the relationship thereof by the donor and the right of plaintiff to use as the holder and owner of the note. The more fact that plaintiff's name appeared as an endorser on the back of the note was immaterial. Pinkerton v. Bailey, 53 U.S. 377. Ownership of a negotiable note is prima facie evidence of ownership by the possessor.

In order prevent the financial ruin threatened by [illegible] or illegal, and it must be determined that the judgments of the Municipal Courts are regular and unopposed by the evidence and satisfied by the plaintiffs making the counterclaim affirmatively.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Burton, J., J., and Frankfurter, J., concur.

328 - 27804

ISAAC GITTLER,
Appellee,

vs.

D. WELD and L. LEVY,
doing business as
Weld and Levy, and
CHARLES SPINER,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

228 I.A. 610

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment was entered by the Municipal Court of Chicago in favor of plaintiff in an action of forcible detainer. There was a jury trial. Defendants have appealed.

The suit was brought to recover possession of premises described as a store located at 552 East Forty-seventh Street, Chicago. The complaint alleged that defendants unlawfully held possession thereof.

The only ground for reversal urged by appellants is that the court erred in refusing to allow the introduction in evidence of the record and files in a certain case entitled Learner v. Spiner, number 789,231, in the Municipal Court. The record does not show that any evidence was received or offered proving or tending to prove that the documents in question were relevant to the issue. No offer of any kind was made before or after the ruling of the court to show the relevancy and materiality of the alleged court records or to show that appellee was a party to the suit of Learner v. Spiner.

It is a well established rule of evidence that where the real purpose of the evidence or its relevancy, materiality, or competency is not apparent, there must be an offer on the part of counsel showing what it is proposed to

prove by the evidence offered. 38 Cyc. 1331. The purpose of offering the supposed records was not indicated and the court committed no error in excluding them. Reavely v. Harris, 239 Ill. 539; Powers v. B. & M. Railroad Co., 175 Mass. 466.

The record shows that defendants were unlawfully in possession of the premises after the expiration of the term of the lease to them and that plaintiff was entitled to the possession.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

prove by the evidence offered. 38 Ops. 1821. The purpose of affixing the supposed records was not indicated and the court concluded no error in excluding them. Beverly v. Burrill, 780 121. 607; Durham v. St. L. Railroad Co., 247 Mass. 464.

The record shows that petitioners were unknowingly in possession of the premises after the expiration of the term of the lease in time and that plaintiff was mentioned in the possession.

The judgment of the municipal Court is affirmed.

[illegible]

Barker, J. D., and Brickley, J., concur.

40 - 27494

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLES FITZMORRIS,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

228 I.A. 614

MR. PRESIDING JUSTICE McMURRAY DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of the Criminal court of Cook County, whereby respondent, Charles Fitzmorris, Superintendent of Police of the City of Chicago, plaintiff in error, was adjudged guilty of a contempt of that court and a fine of $100 and imprisonment in jail for five days imposed.

Carl Wanderer had been convicted of murder in Cook County, Illinois, and was sentenced to be hanged on June 17, 1921. June 13, 1921, a petition was filed to test his sanity and this trial was commenced before Judge David, sitting in the Criminal court, and a jury. The introduction of evidence was begun June 23 and completed June 30.

Prior to June 30, 1921, the respondent stated to some newspaper reporters in his private office, in substance as follows:

> "A fine business. Wanderer isn't half as crazy as some of these coppers will be if they keep letting these men out on insanity pleas. It's undoing the work of my men for months back. It was three months before we could land our evidence. No one doubts he committed the crime - and that's all we are interested in. As it is proved he did, he should hang. They are trying to prove that anyone who commits a felony is a little dippy."

Again on June 30, in a conversation with newspaper reporters he said:

> "I retract nothing. If Judge David calls me into court I will tell him that Wanderer ought to hang. I repeat that if murderers continue to be released on insanity pleas they are not half as crazy as the policemen who are working day and night to send them to jail."

The trial Judge thereupon appointed two members of the bar to act as friends of the court in an investigation; they were granted leave to file an information and interrogatories and an order was entered upon the respondent to answer the interrogatories in writing. Answers were made and filed, and upon a hearing the court denied the motion of respondent that he be discharged as purged of contempt and found him guilty.

In answer to interrogatories respondent said that he knew the persons with whom he had the conversations in which the foregoing statements were made by him were newspaper reporters, but he did not know which newspapers employed them. In answer to other interrogatories he denied that when he made such statements he knew they would be or were likely to be published in one or more of the daily newspapers of the City of Chicago.

It is an old rule that statements as to matters pending in the courts to be contemptuous must be "calculated to impede, embarrass or obstruct the due administration of justice." Stewart v. The People, 4 Ill. 395.

It may be debatable whether the statements made by respondent were of themselves calculated to impede or embarrass the trial as to Wanderer's sanity, but it is evident that they could not effect this unless they were brought in some way to the attention of the jurors and others participating in the trial. It is claimed that possibility of this arose when these statements, in substance were published in certain daily newspapers in Chicago. Under such circumstances, in order to find respondent in contempt, it must appear that he made such statements knowing that they would be or were likely to be published, and this he denies.

Although the truth of these answers are forcefully questioned in argument, we cannot determine this, but must accept the answers as true. This is the well established rule.

"The common law mode of proceeding in cases of contempt presents no question of fact to be tried by a jury. The defendant determines, by his own answer, under oath, whether he is guilty of that which is charged against him as a contempt of court." Storey v. The People, 79 Ill., 45.

"In cases of common law jurisdiction for contempt the defendant is tried upon his answer to interrogatories filed. No other evidence is heard. If the answers prove false the remedy is by indictment for perjury, but if the party purges himself of the contempt by his answer he will be discharged." Hake v. The People, 230 Ill., 174.

"In deciding this case we can only consider the information, supporting affidavits, interrogatories and sworn answers thereto." The People v. Hoyne, 195 Ill. App. 272.

Applying this rule, the comments of respondent must be considered as not intended for publication and hence his conduct cannot be held as calculated to impede, embarrass or obstruct the due administration of justice in the Wanderer trial.

The trial court should have held that respondent was purged of the charge of contempt by his answers to the interrogatories, although he might fittingly have been admonished that nothing so becomes a public official as the habit of restrained and guarded speech.

We conclude that the respondent was not guilty of criminal contempt, and the judgment is therefore reversed.

REVERSED.

Dever and Matchett, JJ., concur.

"The manner and mode of proceeding in cases of contempt presents no question of fact to be tried by a jury. The defendant introduces, by his own answer, under oath, whether he is guilty of the wrong he is charged against him as a contempt of court." Jackson v. The People, 70 Ill., 66.

"In cases of common law jurisdiction for contempt the defendant is called upon his answer to interrogatories filed, he upon evidence is heard. If the charge arose from the result of his conduct in court, but if the charge arose from the conduct of the defendant out of court, his answer to will be disregarded." Duke v. The People, 66 Ill., 106.

"In deciding this case we can only consider the interrogatories, responding affidavits, interpretations and motion showing travels." The People v. Burns, 300 Ill. 400, 132.

Applying this rule, the comments of respondents must be considered as not intended for publication and hence his conduct cannot be held as calculated to impede, embarrass or obstruct the due administration of justice in the Tenbrunsel case.

The trial court should have held that respondent was guilty of the charge of contempt by his answers to the interrogatories, although he might rightfully have been excused from making to present a public criticism on the merit of decisions and pending cases.

We conclude that the respondent was not guilty of criminal contempt, and the judgment is therefore reversed.

Reversed.

Boyer and Dunderdale, JJ., concur.

84 - 27557

MINNA WEBER,
Appellee,

vs.

LOUIS SOLOMON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

228 I.A. 610[4]

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the purchase price of a fur coat which she bought from defendant, upon the ground that it was defective, and upon trial had a verdict and judgment for $600, the amount paid for the coat. Defendant seeks a reversal.

Defendant is in the business of selling fur garments. In October, 1919, plaintiff bought a caracul coat for personal use. She took it home, but says that after wearing it for a few days the garment split in front. She complained to defendant, who explained that it was probably mangled by the machine in making, and that he would mend it, which he did. Plaintiff wore it occasionally for about two weeks longer, when it splint again. Defendant again explained that the machine did not catch it, and said that he would again mend it. December 5th plaintiff paid defendant $600, the price of the garment. She then took the coat with her to New York, and says that while there it started to split and tear and became so torn and full of holes that she did not wear it. She returned to Chicago March 9th, took the coat to defendant and requested that he do something to make the coat good, but defendant refused even to attempt to repair it, disclaiming all liability for its condition. This law suit followed.

Upon the trial the fur coat in question was introduced in evidence and inspected by the jury, plaintiff testifying that it

was in the same condition at the time of the trial as it was when she brought it back to defendant. A furrier testified that the garment was burned by the acid in the dye causing the material to rot and tear. There was also testimony tending to show that a coat of this quality and character of fur usually lasts two or three years. Two other garments were introduced in evidence to support this statement and inspected by the jury. These three garments are not in the record as exhibits upon this appeal. We must therefore conclude that, as evidence was submitted to the jury which is not before us, the jury was justified in concluding that the garment sold by defendant to plaintiff was not fit for wearing, which of course was the purpose for which plaintiff purchased it. This being the fact, plaintiff was entitled to rescind the purchase within a reasonable time and recover the price which had been paid. Sales Act, chapter 121a, sections 18 and 72, Illinois Statute Cahill. There was evidence that the coat was virtually worthless.

Whether or not there was a rescision in a reasonable time was a question of fact for the jury, who could properly find that plaintiff's stay in New York City was a reasonable explanation of why the coat was not sooner returned.

Counsel for respective parties have presented many technical points, upon which we do not comment for the reason that upon the record before us the merits of the controversy are so clearly with plaintiff, and the verdict the only one which could properly be rendered, that any technical errors upon the trial should not compel a reversal. The judgment is therefore affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

221 - 27097

MARIE BRETAG,
Appellee,

vs.

ELLEN M. DOOLEY,
Appellant.

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

223 I.A. 610[5]

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment for $6,500 entered upon a verdict in an action brought to recover compensation for personal injuries received by plaintiff September 19, 1919, when, because of the alleged rotten and defective condition of a railing on the rear porch on the second floor of an apartment building owned by defendant, she fell and was injured.

There is little if any contest as to the facts of the occurrence. Plaintiff was overlooking the moving of her household goods into the flat on the second floor, and with her mother was standing on the rear porch holding her nine months old baby. The mother placed her right hand on the railing and leaned over it to call to someone in the back yard, when the railing gave way; plaintiff attempted to catch her mother, but the two women and the baby went over the edge, carrying the railing with them. The mother struck on her head on the concrete walk and was killed. Plaintiff struck on her back on the concrete steps leading to the basement. The child in her arms was apparently not injured. The railing was the usual and customary wooden railing used in the construction of such buildings in Chicago. It seems to be conceded in argument that the evidence proved the railing was defective in that the wood was decayed and rotten, causing it to give way when plaintiff's mother leaned against it.

It is argued that plaintiff's declaration did not state a cause of action in that it contained no allegation that the defect complained of existed at the time of the letting nor that defendant knew of such defect at this time; neither is it alleged that a careful examination by the defendant would have disclosed the defect complained of. We are not concerned with the question whether the declaration was demurrable, but whether it will support a judgment after verdict. "A verdict will aid a defective statement of a cause of action by supplying facts defectively and imperfectly stated or omitted which are within the general terms of the declaration. Garment Co. v. Kaublin, 218 Ill. 478; Grace & Hyde Co. v. Hanborn, 225 Ill. 138.

The declaration alleges that on September 19, 1918, defendant was the owner and in possession and control of the apartment building in question, consisting of several flats; that plaintiff resided with her husband, a tenant, who had rented from defendant an apartment on the second floor of the building, and that defendant "then and there carelessly and negligently permitted and allowed said railing to become and remain in a dangerous" condition and carelessly and negligently failed to make this known to plaintiff or her husband "at the time of their taking possession, although defendant had notice of the dangerous and unsafe condition of the railing;" that plaintiff had no knowledge of the defective and unsafe condition of the porch and railing, "which was a latent defect and could not have been discovered by her by the exercise of ordinary care." By a fair and reasonable intendment this alleges that the defect existed at the time of the letting and that defendant knew or should have known of the same at this time. After verdict all intendments and presumptions are in favor of the declaration, and if the terms of the declaration include by fair and reasonable intendments any matter necessary to be proved and without proof of which the jury could not have given the

verdict, the want of an express averment of such matter is cured by the verdict. 1 Chitty's Pleading, 673. This rule has been repeatedly followed; see Hirsnich v. C. & A. R. R. Co., 217 Ill. App. 336, and cases therein cited. The declaration in question is sufficient under this rule.

It was also sufficient to allege that the defect was latent and could not have been discovered by plaintiff "by the exercise of ordinary care." We know of no rule requiring, under such circumstances, that the tenant must exercise a "careful examination" for latent defects. While some of the cases use this expression, we do not find it definitely decided that the tenant must use more than reasonable diligence or ordinary care to discover defects. Hunsacck v. Morey, 198 Ill. 568; Hornyard v. Gale, 205 Ill. 511; Kelley v. Greaston, 222 Ill. App. 639.

It should be noted that the jury were instructed at the request of defendant that unless these conditions which the declaration is said to omit were proven, there could be no recovery. She cannot now claim that the law is otherwise.

It is earnestly argued that the relation of landlord and tenant did not exist between the parties. Lauderdale & Son were renting agents for defendant; plaintiff called at their office September 16, 1918, and there signed what is called a tenant application, by which she agreed to sign a lease in the usual form and pay a full month's rent within three days, subject to satisfactory references, et cetera. At the same time she paid five dollars as a deposit to secure the lease and received a receipt, by which she agreed that if the application was accepted she would rent the flat from September 19, 1918, to September 30, 1919, at a monthly rental of $20, payable monthly in advance. She also agreed "to sign the usual form of lease when same is prepared, and pay the balance of the first installment of rent, and failing to do so

within five days from date hereof, said deposit will be forfeited."

On the morning of September 19th plaintiff obtained the key to the apartment from another tenant in the building and went to Mr. Lauderdale's office and paid the balance of the first month's rent. She received a receipt bearing that date, which recited that $20 had been paid "in full for one month's rent from Sep't 19---- 1918, to and including October 18, 1918." Plaintiff testified that at this time Lauderdale said she could move in. He testifies he told her it would be necessary for her to sign a written lease before she moved in, and she promised to have her husband do this as soon as he returned to town in a day or two. The acceptance of the rent in full for the month beginning September 19th and the recitals of the receipt therefor rather tend to corroborate plaintiff's version. Plaintiff would hardly have paid the first month's rent in full without permission to take possession.

But whatever may have been the rights of the parties under the prospective written lease for a year, when the first month's rent, from September 19th to October 18th, was paid in full and accepted, plaintiff was, at least, a tenant for this period and the relation of landlord and tenant existed between the parties at the time of the accident.

By instructions given at the request of defendant the jury were told it must be proven that defendant knew that a dangerous, defective condition existed in the railing, "or in the exercise of ordinary care should have known" of this condition. This is the correct rule of law and has been stated frequently. Norman v. Sandgren, 37 Ill. App. 160; Chicago Consolidated Bottling Co. v. Mitton, 41 Ill. App. 154; Everett v. Foley, 132 Ill. App. 433, and cases therein cited.

The record justifies the conclusion that defendant, through her agent, had actual knowledge of the defective condition

within five days from date hereof, said deposit will be forfeited."

On the morning of September 10th plaintiff obtained the key to the apartment from another tenant in the building, and went to Mr. Bondurant's office and paid the balance of the first month's rent. She received a rubber-stamped receipt, which recited that $80 had been paid "in full for one month's rent from sep't 10----- 1924, to and including October 10, 1924." Plaintiff testified that at this time Bondurant said she could move in. He testified he told her it would be necessary for her to sign a written lease before she moved in, and she promised to have her husband do this as soon as he returned to town in a day or two. The acceptance of the rent in full for the month beginning September 10th and the receipts of the receipt-rubber receipt book in conversation plaintiff's version. Plaintiff would hardly have said the first month's rent in full without qualification if this conversation had taken place.

Not relieved you have been the victim of the practice under the prospective building laws for a year, when the first month's rent, from September 10th to October 10th, was paid in full and accepted, plaintiff was, at least, a tenant for this period and the relation of landlord and tenant existed between the parties at the time of the accident.

By instructions given at the request of defendant the jury were told it must be proven that defendant knew that a dangerous, defective condition existed in the building, "or in the exercise of ordinary care should have known" of this condition. This is the correct rule of law and has been stated frequently. Jensen v. Bankson, 84 Ill. App. 490; Illinois Steel Co. v. Bilandic, 151 Ill. App. 154; Bennett v. Fuller, 147 Ill. App. 424, and many other similar cases.

The record justifies the instruction that defendant, through her agent, had actual knowledge of the defective condition

of the railing in question. Defendant's husband built the building some twenty or thirty years before this time. Mr. Dooley looked after the property and was the general agent for his wife in making repairs. Mr. Lauderdale testifies that he had never seen Mrs. Dooley prior to the accident and always received authority from Mr. Dooley. Defendant testified that if anything was needed in the way of repairs Mr. Dooley would report to her and repair the same, that he would "look around to see if everything was safe." A previous tenant testified that she had called Mr. Dooley's attention to the railing. Another tenant of this same apartment who had vacated September 1, 1918, testified that she never saw anyone in connection with repairs except Mr. Dooley; that after she had been in the apartment for awhile she had discovered the defective condition of the railing and called Mr. Dooley's attention to this; that in August, 1918, she told him to be careful not to lean against the railing, as it was very loose, but that he had replied it was "built to stay and not to fall down." Defendant testified that her husband did not report these complaints to her. Mr. Dooley died before the time of the trial. As he was defendant's agent to keep the premises in a safe condition and to make necessary repairs to this end, his knowledge of the defective condition of the railing would be imputed to the owner.

While some of the questions put to witnesses were leading and perhaps objectionable, yet the rulings of the court thereon do not require a reversal.

It is earnestly insisted that the verdict of $6500 is excessive. We are inclined to hold that this objection is meritorious. The accident might have resulted in serious and permanent injuries, but, strangely enough, plaintiff seems to have escaped this. After she fell she was either carried or walked up from the basement steps into the yard and sat upright, very

naturally devoting most of her attention to her fatally injured mother. Then she walked up several steps onto the rear porch of the apartment. In about two hours she walked with assistance to an automobile and was driven to her mother's home, all the time carrying her child in her arms, and alighting at her mother's home walked up two flights of stairs and was able to sit there for some minutes. Her clothing was removed and a doctor examined her, who testified that he found bruises over the lumbar region, on the shin bone and around the arms and knees; that he found only a little swelling; that there were no bones broken; that he examined her spine and found no paralysis and no interference of any nerves coming out of the spinal cord at the place of the lumbar; that she had a nervous heart, increased naturally by the shock of the fall, but this disappeared shortly afterward; that he attended her four times; that she continued to improve, and that he found nothing permanent the matter with her. An osteopath testified to a "lump or swollen condition of the small of the back at the junction of the lumbar and sacral region." A physician testifying on her behalf, who had examined her for the purpose of testifying, stated that the reflexes were all substantially normal, and that there were "no objective symptoms of disorder." Other physicians testified to the same effect. An X-ray photograph of the vertebrae was taken, but it is not claimed that it discloses any abnormality. Before the accident she had been in good health, weighing about 153 pounds. Five or six months after the accident her weight decreased to 110 pounds, although it subsequently increased and at the time of the trial she weighed 147 pounds. She testified that immediately after the accident she felt dazed and dizzy and suffered pain from bruises around the small of her back; that she had a stiff neck which continued for three or four months. She complained of pain if she is

on her feet for any length of time or does any hard housework. She evidently received a severe nervous shock, causing nausea and headaches.

It is pointedly suggested that the jury, in awarding such a large amount, was influenced by the death of plaintiff's mother through the same accident.

Under these circumstances we are not content to allow the judgment for $6500 to stand. It is therefore ordered that if plaintiff, within twenty days from the date of this filing, shall remit $2500 from the amount of the judgment, the judgment will be affirmed for $4,000, and the costs of this appeal shall be taxed against defendant; otherwise the judgment is reversed and the cause is remanded.

JUDGMENT AFFIRMED UPON REMITTITUR OF $2,500;
OTHERWISE REVERSED AND REMANDED.

Dever and Hatchett, JJ., concur.

246 - 27722

JOSEPHINE M. RAY and IDA M. MERRIRVE,
Appellees,

vs.

WILLIAM BUNK CUTLERY COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of an adverse judgment in a forcible detainer action tried by court and jury.

Two alleged errors are presented for consideration. Defendant says plaintiffs did not make a prima facie case for the reason they were not present in person to testify that they were entitled to possession. The evidence shows the property had been handled for several years by an agent, Mr. Krumrine, who leased the building, paid taxes and remitted the net proceeds to the plaintiffs. He also received from plaintiffs funds with which to pay taxes when the rents were not sufficient for this purpose. A lease was introduced running from Krumrine, as agent and lessee, to defendant, which lease had been terminated by Krumrine pursuant to one of the provisions therein.

The title to real estate is not involved in a forcible detainer action. This is merely a suit for possession and evidence as to ownership is relevant only to the question of right to possession. It is apparent that Krumrine was agent for and represented plaintiffs, who were the owners of the property. This made a prima facie case, and the court properly denied defendant's motion for a directed verdict.

The other point is that after written notice of termination had been served Krumrine verbally withdrew it in an alleged conversation, in which defendant's president was told to "forget about the notice." Krumrine categorically denies this and asserts that he never at any time withdrew the notice or said anything that would convey that meaning. These variant stories were for the jury to consider, and we cannot say that the conclusion favorable to Krumrine's version was clearly unwarranted.

No meritorious grounds have been presented for reversal, and the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

273 - 27740

JACOB HAMMERMAN,
Appellee,

vs.

HERMAN GROSSMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

223 I.A. 611

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of a judgment against him for $2070.66, upon a directed verdict in a suit brought on the promissory note for $2,000, dated June 15, 1930, due January 1, 1931, to the order of M. Meyer, by whom it was endorsed, and which subsequently was purchased by plaintiff.

The defense was based upon a certain contract between defendant and Meyer recited that on June 19, 1930, defendant had purchased from Meyer his capital stock of the Kennedy Company, which was engaged in manufacturing and selling clothes. The price was $6,200, payable part in cash and the balance by note for $2,000, the instrument in question. Meyer agreed as part of the consideration of the purchase not to do anything that would tend to injure the Kennedy Company nor to engage in a similar line of business for a period of two years within the City of Chicago or vicinity. It was also agreed that should Meyer violate the agreement in any manner the $2,000 note should be null and void.

Mr. Brown, an attorney, testified that he was present at the time the contract was executed and that by agreement the $2,000 note was delivered to him to be held in escrow, and that he so held it until December 15, 1930, when it was sold and delivered by him to plaintiff at a discount of $100. Brown says he was entitled to

$500 out of the note in payment of his fee as attorney in connection with the deal between Meyer and Grossman. Plaintiff at this time knew nothing about the contract.

Mr. Weisberg, attorney for defendant, testified that a day or two before Christmas plaintiff telephoned to him that he had a note signed by Grossman, and he then informed plaintiff of the contract and the substance of its terms. This is denied in part by plaintiff, who testified there was no telephone conversation, but that he talked with Mr. Weisberg "regarding the payment of this note in a general way."

Upon trial defendant offered the contract in evidence, which was excluded by the court. It was claimed that this was error.

The evidence established that plaintiff became the owner and holder of the note before maturity in good faith for a favorable consideration, without notice of any infirmity or defense. Under such circumstances he was a holder in due course, holding the instrument free from any defense which might be available to Meyer and Grossman among themselves arising out of their contract. The situation is governed by the provisions of the Negotiable Instrument Statute, Cahill, chap. 98, secs. 73, 77 and 79.

Defendant contends plaintiff had knowledge of the defense at the time he purchased the note. The evidence shows to the contrary. Both plaintiff and Brown testify without contradiction that the note was purchased by plaintiff on December 18, when plaintiff had no knowledge of the contract, and the testimony of defendant's attorney as to the time when he notified plaintiff of the contract places this at a day or two before Christmas, and the conversation indicates that the purchase of the note had taken place some time before. In this state of the evidence the contract between Grossman and Meyer could not affect plaintiff's rights, and

it was proper to exclude it as immaterial.

It is an additional point for plaintiff that defendant did not prove or offer to prove any breach by Meyer of the contract. Before it could avail as a defense it was necessary to show a breach of his obligations which would operate to nullify and void the note. Nothing of this kind appears. It is not a sufficient excuse to say that after the court ruled against the contract it would have been unavailing to introduce evidence of a breach. At least an offer of such evidence should have been made. We must take the record as it is, and from it it does not appear that even if the court had admitted the contract it would have prevailed as a defense.

Upon the evidence before the court there was no issue to be submitted to the jury. Plaintiff had made a prima facie case that he was a holder of the note in due course and there was nothing tending to disprove this. Under such circumstances it was proper to instruct the jury to find for the plaintiff, and the verdict and judgment followed. There is no reason to reverse, and the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

385 - 27762

(28099)

In Re Petition of L. JANUCHOWSKI,
Insolvent Debtor.

On Appeal of LEONHARD JANUCHOWSKI,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS
et al.,
Appellees.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order remanding Leonhard Januchowski to the custody of the Sheriff of Cook County, pursuant to the verdict of a jury upon his petition for release from an arrest on a capias ad satisfaciendum.

It was charged that the petitioner had been guilty of a fraud in procuring a loan; this was presented to a jury by evidence that petitioner, who was connected with a real estate firm, was told by Oscar Krager, a fellow lodge member, that he desired to invest some money in real estate, whereupon the petitioner told him not to buy them because he, the petitioner, had a good proposition for him. Subsequently petitioner called at the home of Mr. and Mrs. Krager in his automobile and told them he had bought real estate on Wilson avenue for $11,000, paying $3,000 down. He then took these parties in his automobile to numbers 2736 and 2737 Leland avenue and told them he had also bought that property and needed $4,000 to improve these properties. Mr. Krager told him they had only $2,000 and might let him have $1,500. Petitioner therefore proposed that they give him $1,500, for which he would give his promissory note for $2,000, giving them a profit of $500, and that "he would sell the house in six months and the $2,000 would be repaid." The $1,500 in currency was paid over to peti-

tioner, who gave the Kragers his note for $2,000 due October 10, 1920. Subsequently when the note matured, petitioner requested the Kragers to wait until December 1'th, when property owned by himself and another would be sold, which would give petitioner funds to pay the note, and said that if they would wait he would give them $150 in addition to the $2,000. Thereupon the Kragers surrendered the $2,000 note to the petitioner and received one for $2,150 due December 15th. No part of the $1,500 was ever repaid, and it is conceded that petitioner never owned either of the properties on Wilson or Leland avenues. Petitioner further testified that he did not own and had no interest in any properties during the year 1920. Suit was brought in the Superior court and judgment for $1,500 rendered against petitioner, upon which a capias ad respondendum was issued. Thereafter he was arrested on a capias ad satisfaciendum and subsequently filed his petition for release in the County court under the Insolvent Debtor's act, and a jury was called to try the issue whether he was guilty of fraud in procuring the $1,500.

The verdict of the jury finding petitioner guilty of fraud is not questioned in this court. Fraud was amply proven and no other verdict could properly have been returned.

The only points presented as reasons for reversal relate to the admissibility of two items of evidence. Mr. and Mrs. Krager testified that they would not have loaned petitioner the money unless they believed his representation to them that he owned these pieces of property. This was admissible. Such testimony was not merely opinion evidence or evidence as to a state of mind, but was evidence of the fact that these parties advanced their money to petitioner because they relied upon his statements. A similar objection was made to like testimony in People v. Neil, 244 Ill. 178, the plaintiffs in error there contending that the statement of the

claims, who gave the Langers his name for $3,000 due October 10, 1930. Subsequently when the note matured, petitioner renewed the Langers to wait until December 10th, then purchased bond by issuing and mailing email to Hill, which would offer sufficient funds to pay the note, and said that if they would wait he would give them $1000 in addition to the $3,000. Thereupon the Langers extended the $3,000 note to the petitioner and received one for $3,000 due December 10th. He made of the $3,000 the ever result, and it is admitted that petitioner never acted either as the proprietor or fiduciary or trust agent. Petitioner further testified that he did not and had no interest in any proceeds during the year 1930. But the thought in the Langers could not [illegible] for $3,000 received against petitioner, then which a series of conditions was issued. Thereupon it was arrested on a series of [illegible] but subsequently filed bond pending the [illegible] in the County court after the Langers's act, and a jury was called to try the case without in the spring of 1931 [illegible] the $3,000.

The verdict of the jury finding petitioner guilty of fraud is not questioned in this court. Fraud has only proven and no other verdict could properly have [illegible].

The only point presented is whether the [illegible] was in the administrator of the [illegible] of [illegible]. Mr. and Mrs. Langer testified that they would not have loaned [illegible] money unless they believed his representation to them that he owned [illegible] of property. This was admissible. Mrs. Langer was not merely giving evidence or reference as to a state of mind, but was evidence of the fact that Mrs. Langer parted [illegible] money to petitioner because they relied upon his statements. A similar ob- jection was made to like testimony in Lewis v. Hill, 64 Ill. 274, the majority in error in overruling that the statement of the

prosecuting witness that he relied on the false pretenses was not a matter of fact, but a mere opinion. The court, however, said: "We fail to see any force in this contention. If Smith believed in and relied on the false statements made by the plaintiffs in error, it was a fact to which he was competent to testify."

The court admitted in evidence a photograph of the premises on Leland avenue after the witness, Krager, had stated that it was a correct picture of the premises shown to him and his wife by petitioner, which he claimed to own, which statement was the basis of their loan to him. We see no valid objection to this. It is not denied that it is a correct photograph of the premises. It shows a substantial and modern three story stone and brick apartment building. It was admissible as tending to support the claim of Mr. and Mrs. Krager that they loaned their money to petitioner upon the strength of his pretense of ownership of this property. The appearance of the property was one of the inducements to secure their confidence. As such it was proper to be considered by the jury.

Fraud was so clearly shown by competent evidence that the points made on this appeal, even if meritorious, would not warrant us in reversing the judgment. It is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

300 - 27776

certiorari denied

NICHOLAS A. MAY,
Appellee,

vs.

FRANK T. KENNEDY et al.
On Appeal of CATHERINE MERCER
and THOMAS H. MERCER,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

228 I.A. 61

MR. PRESIDING JUSTICE McBURNEY
DELIVERED THE OPINION OF THE COURT.

By this appeal Catherine Mercer and Thomas H. Mercer, defendants, question a decree in a chancery proceeding brought by Nicholas A. May, who alleged that there were wrongfully obtained from him a second mortgage note and trust deed, and sought to establish ownership thereof and to enforce his rights thereunder in the foreclosure proceedings of the first mortgage. Answer was filed and the cause referred to a master in chancery, who heard evidence and reported his conclusions, which were favorable to complainant. Upon hearing before the chancellor the exceptions to the master's report were over-ruled and a decree was entered substantially in accordance with the master's recommendations.

The record shows that May had known one Frank T. Kennedy for about sixteen years and at one time worked for him, performing light duties such as answering the telephone and taking orders. He also had known Thomas H. Mercer, one of defendants, a lawyer, who had formerly represented him in a certain deal. He had confidence in Kennedy and out of his savings had loaned him various amounts without any security except Kennedy's personal notes. July 6, 1914, he loaned Kennedy $1,000, taking his note therefor, due in three years, with six

per cent interest, secured by a trust deed from Kennedy and wife conveying certain real estate, subject to a prior trust deed from them to Edward A. Dicker, trustee, to secure their note for $2,000.

For a period of about ten years prior to June, 1919, complainant suffered from locomotor ataxia and from failing eyesight, and in 1918 became an inmate of the Lake County Poor Farm at Crown Point, Indiana. He was there under the care of a physician, who treated his eyes. His education had been very meager, and at this time his eyesight was so affected that he could not read. He was unable to walk or stand and went about in a wheel chair.

A bill was filed to foreclose the first mortgage and summons was issued June 17, 1919, from the Circuit court of Cook County against Frank T. Kennedy and wife and the unknown owners of the second mortgage note for $1,000. June 15th Frank T. Kennedy and Thomas H. Mercer visited May at the Poor Farm and informed him of the proceedings to foreclose the first mortgage and that it would be necessary for him to appear in court the following day with his note and trust deed; that they would have Mercer present his second mortgage "and get something out of it," and that the "papers had to be there;" that Mercer would defend the case for May, and, in response to inquiry, said that he would charge only $50 for his services. The note and trust deed were then in the possession of complainant's son Charles. Mercer wrote an order on Charles for them, and had May sign it, although he was unable to read, and says that he took Mercer's word for what it contained. Kennedy and Mercer called upon the son and secured the note, with interest coupons and the trust deed, representing to the son that these papers must be presented in court the following day, which as a matter of fact was the day the summons in the foreclosure suit was returnable.

A few days later Kennedy and Mercer called upon complainant at the Poor Farm and told him they had brought some interest money for him and Mercer asked whether complainant wanted the $200 in money or in Liberty bonds, and complainant replied that he preferred the bonds, and four Liberty bonds aggregating a par value of $200 were given by Mercer to May; at the same time Mercer presented a paper to May, telling him that it was a receipt for the bonds and requesting him to sign it, which he did. This paper was in fact an assignment for a consideration of $200 to Catherine Mercer of all of May's right, title and interest in the $1,000 note, the interest notes and the trust deed securing the same. Catherine Mercer had no knowledge of the existence of this note and trust deed at the time it was obtained by Thomas Mercer, and the master found that her knowledge of the details of the transaction appeared to be hazy. It is in evidence that Mercer went to see May at the instance of Kennedy with the "idea that if I could make some money on it I would buy the mortgage." Subsequently May asked Mercer what he had done about the suit and was told that he "had filed the case over -- your notes ain't very good."

Although Mercer purported to act as his attorney he did not inform May as to what was necessary to protect his interest in the foreclosure proceedings, and May did not know that he had executed an assignment to Catherine Mercer, whose name was not mentioned to him on either visit. Thomas Mercer and Catherine Mercer are brother and sister, and Frank Kennedy is a distant cousin of theirs.

July 3, 1919, Catherine Mercer filed an answer in the foreclosure proceeding of the first mortgage, claiming to be the legal owner of the said $1,000 note, interest coupons and trust deed, and on the same day filed a cross-bill to foreclose the same. September 29th a final decree was entered in the foreclosure suit,

fixing the rights of the first mortgagee and finding that Catherine Mercer had a lien subject thereto for $1379.31, with interest, and directing a sale, and that after settling the first mortgage the balance, if any, should be paid to Catherine Mercer. October 27, 1913, she bid in the premises for $3300. From this the master retained his fees and paid the holder of the first mortgage in full, and the balance of $309.11 was paid to Catherine Mercer, leaving a deficiency in her favor of $579.14, for which a deficiency decree was entered against Kennedy and his wife and a certificate of sale was issued to Catherine Mercer.

The master in the present suit found that Thomas and Catherine Mercer occupied the premises in question; that Thomas Mercer had not only known complainant for a number of years and represented him in legal matters, but also represented and advised Frank Kennedy on legal matters, and that at the time of the foreclosure proceedings said Kennedy was unable to pay his current obligations and was on the verge of bankruptcy.

The final decree in this suit was entered December 10, 1921, approving the master's report and including substantially his findings and following the recommendations of the report. The decree found that the assignment by complainant of his notes and trust deed to Catherine Mercer was an imposition upon the trust and confidence imposed in Mercer and Kennedy by May, who, because of his impaired physical condition was unable to protect his interests, and that they, under the circumstances, were bound to safeguard his equity in the property being foreclosed; that Catherine Mercer was not a bona fide purchaser for value and that she took title to the notes and trust deed with full knowledge of complainant's rights therein, and that the consideration paid for the same was so grossly inadequate as to deprive her of any right of the protection of a court of equity; that she took title to these as trustee for the

claims the rights of the first occupiers and claiming that Catherine Denver had a time multiple forever due [illegible], [illegible] Indeed, and discovering a mine, and that after building the first newspaper in Denver, if any, should be paid to Catherine Denver. Despite [illegible], [illegible], she had in the previous [illegible]. Upon this basis the master was [illegible] his fees and paid the balance of the final settlement in full, and [illegible] of [illegible], he paid in advance Denver, leaving a deficiency in her favor of $[illegible], for which a deficiency account was entered against Donnely and his wife and a certificate of sale was issued to Catherine Denver.

The matter in the present suit stand that Donnely and Catherine Denver complete the purchase of [illegible] and Denver has not only known complainant for a number of years and supported him in legal matters, but also prosecuted and defended lawsuits Donnely on legal matters, and that at the time of the investigation proceedings said Donnely was unable to pay his attorney obligations and was on the verge of bankruptcy.

The final decree in this suit was entered December 12, 1881, approving the master's report and incorporating substantially his findings and tendering the recommendations of the report. The lower found that the assignment by [illegible] of his notes and that lost to Catherine Denver was an imposition upon the trust and confidence imposed in Morrow and Donnely by her, and, because of his superior physical condition was unable to protect his interests, and that [illegible], under the circumstances, they should in [illegible] the equity in the property held fraudulently for Catherine Denver was not a John Doe purchaser for value and had the best title to the mine [illegible] that [illegible] of [illegible] stake, and that the consideration paid for the mine was so grossly inadequate as to deprive her of any right of the protection of a court of equity; that the best title to mines as treated for the

use and benefit of complainant, subject to her right to be reimbursed to the extent of $200, the amount of the Liberty bonds; that said Catherine and Thomas Mercer wrongfully used and converted to their own use said notes, coupons and trust deed which were the property of complainant, in foreclosing the same in Catherine Mercer's name on her cross-bill. It was therefore decreed that complainant was entitled to a lien on said premises for $809.11, with interest at six per cent per annum from September 23, 1919, so far as the value of said premises exceeds $2490.89, which was the amount that Catherine Mercer paid in cash to satisfy the sum found due to the first mortgagee. It was also decreed that Catherine Mercer should hold the deficiency decree in her favor in trust for complainant and assign the same to him and account to him for the moneys received thereon with interest, provided she should be credited with $300, made up of $200, the value of the Liberty bonds, and $100, the reasonable value of her solicitor's services in the foreclosure suit; that the master's fees and costs should be taxed against Catherine Mercer and Thomas Mercer and that all the rights of the parties were subject to the rights of the complainant as above set forth. It was also held that there should be an accounting before the master of the rents and profits collected by Catherine Mercer from said real estate with the necessary expenditures made by her.

Manifestly the record shows that complainant was entitled to equitable relief. Defendants question the finding that Catherine Mercer's knowledge of the transaction appeared to be hazy, but there was sufficient evidence to justify such a finding.

The rule that "He who seeks equity must do equity" would not require as a condition precedent to relief for complainant that he must first repay Catherine Mercer the moneys she had advanced. The true meaning of the rule is that equitable relief will not be granted except upon equitable terms. 21 Corpus Juris,

174. Reference to the decree shows that Catherine Mercer's rights were amply protected.

Complainant is not seeking to rescind a contract on the ground of fraud. There was no contract between the parties; their minds never met. The notes and trust deed were procured from complainant not through a contract but by subterfuge, so that Catherine Mercer held this property as a constructive trustee for the benefit of complainant.

Nor is this a case of relief on the ground of inadequacy of consideration. The parties were not contracting, hence no consideration, inadequate or otherwise, was involved.

It was proper to pay six per cent on moneys received by Catherine Mercer on the deficiency decree from the time she receives such payments. This is not a judgment and the statutory rate of interest at five per cent is not applicable. Minor criticisms are made of the decree, but they are not of importance.

Upon the whole record complainant was manifestly entitled to the equitable relief granted by the decree, which gives all parties concerned their just dues, and it will not be changed.

AFFIRMED.

Dever and Matchett, JJ., concur.

1926. A-Forward in the Jersey Bowery-Dunn Ballplay-Jerseys's pitcher were really pitchers.

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For it take a stand at relief on the ground of health quality of institutions. The position very not monopolies, large be Democratic, Dominion is a company, non Dominion.

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Dunn the which Dunne conglomerate monopolistic and monopolistic ownership in the monopolistic Detroit Dominion by the Dunne. Which Jersey all people monopoly which just Dunn, not is not not be of equal.

CONCLUSION.

Lorenzo not Detroit, 37., Jersey.

27788

312 - 27788

LOUIS NEVAL, Doing Business as
The Neval Mercantile House,
Appellee,

vs.

ORLANDO V. D. YOUNG,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

22 I.A. 612

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a promissory note of defendant for $100 with interest and attorney's fees, and for a balance of $175 for merchandise sold to defendant. These claims were not disputed, but defendant asserted certain counter claims for dental work as a set-off. Upon trial by the court plaintiff was given judgment for $181, from which defendant appeals.

Defendant's set-off gave six items of dental work for various persons, two of which were for work done for plaintiff, and the other items are said to have been charged to plaintiff's account at his request. To this set-off plaintiff filed an affidavit of defense, asserting that (1) dental services performed for the persons named in the statement other than plaintiff were not rendered at plaintiff's request; (2) items for personal dental services charged to plaintiff have been paid for in full; (3) the Statute of Limitations had run as to five items of the set-off. It is apparent from the face of the set-off that the statute had run as to certain items. No plea or affidavit was filed by defendant to plaintiff's affidavit of merits. The trial court disallowed certain items of defendant's set-off, and we believe properly.

The practice as to set-offs is regulated by section

12 of the Statute of Limitations, and section 47 of the Practice Act, Cahill, Illinois Statutes. By section 13 a defendant is permitted to plead a set-off or counter-claim "barred by the Statute of Limitations, while held and owned by him, to any action the cause of which was owned by the plaintiff or person under whom he claims, before such set-off or counter-claim was so barred, and not otherwise." Stearns v. Brownell, 124 Ill. 27; Hahn v. Eaton, 102 Ill. App. 385. Defendant did not plead or prove that the said items in his statement of set-off were held and owned by him at the time they became barred, and that plaintiff's causes of action were held and owned by plaintiff before defendant's claims were so barred. The failure to do this sustained the bar of the statute, as the trial court properly held.

We are also of the opinion that the court could rightly find that some of defendant's items of set-off were not sufficiently proven. The first item was for services rendered to Mrs. Reval, but she testified that all work done for her by defendant had been paid for. The next item was for services to Lewis Reval, Jr., but this is not supported by sufficient proof. The same is true of the next item of further services for Lewis Reval, Jr. The better evidence is that these services were to plaintiff personally. The next item is admittedly for work done to plaintiff, and it is conceded that this has been paid for in full. The next item is claimed to be for services to plaintiff. This was not proven, although there was some proof that services were rendered at this time for Mrs. Reval. The last item is for services said to have been rendered for a bookkeeper employed by plaintiff. There is controversy as to whether plaintiff had agreed to pay for this. The trial court, however, apparently accepted defendant's testimony to the effect that he and plaintiff had agreed to make the amount of this charge $175, which was to cover the amount of

Ed of the Swedish of Liechtenstein, and section 27 of the Treaties Act, 1968, Eliminate Statutes. By section 32 - determined is permitted to plead a set-off or counter-claim filtered by the Statutes of Liechtenstein, while both and should by plan, in any action the amount of which was owed by the plaintiff or arising under some claim be claim, therein such set-off or counter-claim was as proved, and not otherwise." Dawson v. Bromwich, 104 Ill. 77; Jones v. Butler, 330 Ill. App. 338. Defendant did not plead or prove that the bill issue in his statement of defense; were bill and issued by his or the time they issued bonds, and that plaintiff's receipt of money this bill was owed by plaintiff before defendant's alleged work as bonds. The failure to plead the relation the bar of the claims on the total owed proximately bills.

We are glad of the opinion that the court could modify that that made of defendant's claim of setoff upon the multiplicity grounds. The first item was the services rendered in Ire. Ford, for the institution that of work upon the bar by the Ferdinand Ed that was full Ire. The work from the the services in Lewis Ewing, (1), not fully in not sufficient as multiplicity suit. In work is that of the time spent of counsel examine the lawsuit owed, (2). The bring attorney in time these services was in plaintiff's possession. The work also in notify only the upon does in plaintiff, and is to remember the time the was upon for in this the work that is division in as for work in a multiplicity. This the was yours, although there was been that this services work con- duced at this time for Ire. Ewing. The time then in for services said is been been counsel for a bonds multiple in plaintiff. There is necessary in a work plaintiff not appear to for for time. The total work, however, necessarily assumed defendant's case must be the office that be and plaintiff not serve in year the amount of the change bill, which we as over the amount of

the merchandise purchased by defendant from plaintiff. No cross-errors have been assigned by plaintiff.

Defendant's counsel present arguments based upon certain ledger sheets and cards which, however, do not appear in the abstract. We shall not search the record for reasons for reversal which do not appear in the abstract.

The credibility of the variant stories of the parties could be determined by the trial court better than by us. The trial court evidently attempted to reach a just decision, awarding to each party respectively what seemed properly his just dues. We see no sufficient reason to reverse the judgment and it is affirmed.

AFFIRMED.

Dover and Hatchett, JJ., concur.

319 - 27795

H. J. BRUCKER,
Appellee,

vs.

LUELLA HOWARD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant in a forcible detainer suit brought by plaintiff, a lessee of the owner of the premises involved.

Defendant does not question the judgment, but says that he is asking "for the benefit of a six month's stay," evidently referring to the amendment of May 3, 1921, to section 18 of the Forcible Detainer Act, Cahill Statutes.

The record does not show that defendant asked the trial court for a stay, and there is no assignment of error as to any refusal of the court to stay the execution.

Defendant's counsel suggests that since this judgment plaintiff has surrendered his lease to the owner, who also has brought a forcible detainer suit against defendant. This cannot affect the validity of the judgment already rendered.

As no sufficient reason is presented for reversing the judgment it is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

27800

324 - 27800

L. H. WENDLE,
Appellee,

vs.

LUELLA HOWARD,
Appellant.

28130

228 I A 612

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

Consolidate with 28128 for Mrd.
2-21-23

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a companion case to Becker v. Howard, general number 27703, in which our opinion has this day been filed. In that case the plaintiff, Becker, was a lessee from the owner, Wendle, who is the plaintiff in this case.

After the judgment for possession in Becker v. Howard, Wendle and Becker by an agreement in writing cancelled the lease between them and Becker's rights therein as lessee were surrendered. Wendle thereupon, October 20, 1921, notified defendant in writing that he was entitled to immediate possession of the premises, that she might continue as a tenant from month to month at a rental of $65 a month, and that her tenancy would terminate December 31, 1921, and possession on that day was demanded. Defendant, however, paid no rent, whereupon plaintiff served a five days notice and after the expiration of the notice brought this suit in forcible detainer, and upon trial had judgment for possession, from which defendant appeals.

Defendant's first point is that the judgment in Becker v. Howard was res adjudicata pending this appeal. That judgment could not be res adjudicata in this suit, which is a subsequent suit between different parties and for a different cause of action. However, the adjudication in the other case against defendant has been this day affirmed by us.

It is said that the filing of the appeal bond in the

other case acts as a supersedeas in this case, which is of course obviously untenable.

It is said that the service of the five days notice in this case recognizes the tenancy after the termination of the lease. A tenant holding over after the expiration of a lease does not renew the tenancy except at the landlord's election. Condon v. Brockway, 157 Ill. 90. Here the landlord offered to allow defendant to remain after the termination of the lease upon a month to month tenancy upon the condition of payment of certain rental. This rental defendant failed to pay, whereupon the landlord properly terminated this tenancy by notice, the judgment for possession in the plaintiff lawfully followed and is therefore affirmed.

AFFIRMED.

Matchett and Dever, JJ., concur.

9 - 26671

VACLAV JANOTA and ANTOINIE JANOTA,
Defendants in Error,

vs.

MARIE KOLAR and JOSEF KOLAR,
Plaintiffs in Error.

ERROR TO THE SUPERIOR COURT OF COOK COUNTY.

22 - L.A. 612

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

October 18, 1917, a judgment by confession was entered in the Superior court of Cook County against defendants Marie Kolar and Josef Kolar, and in favor of Vaclav Janota and Antoinie Janota, plaintiffs.

November 2, 1917, an order was entered in the cause on motion of defendants giving the latter leave to plead in the cause within ten days, the judgment to stand as security, and November 25, 1918, the cause was submitted for trial before a jury, which on November 26, 1918, returned a verdict for the plaintiffs in the sum of $[illegible]22.30. On the same day an order was entered discontinuing the cause as to the plaintiff Vaclav Janota, and on motion of defendant's attorney the death of defendant Josef Kolar was suggested and an order entered abating the suit as to this defendant.

The abstract of record shows merely the judgment, orders and verdict entered in the cause, and the only exceptions taken are to an order entered December 31, 1918, vacating the order of November 26, 1918, which suggested the death of the defendant Josef Kolar, and also to the order which, on the verdict of the jury, directed that the original judgment entered in favor of the plaintiffs was to stand in full force and effect as of the date of its rendition and which ordered execution to issue thereon. The record contains no bill of exceptions. The abstract of record recites only that

certain motions were made and complaint is made of the rulings thereon. These motions, with proper exceptions to the rulings of the court, should have been incorporated in a bill of exceptions and properly abstracted in the abstract of record.

In the case of People v. Glascow, 301 Ill. 394, the Supreme Court said:

> "Appellants have assigned error on the court's ruling on the motion, but they are in no position to question in this court the trial court's rulings on the motion for the reason that there is no bill of exceptions or stenographic report signed by the trial judge and made a part of the record. People v. Board of Review, 262 Ill. 326."

In People v. Harrigan, 291 Ill. 306, the Supreme Court said:

> "None of said motions and bonds or other matters have been included in any stenographic report, bill of exceptions or certificate of evidence as required in section 31 of the Practice Act in order that such matters may become a part of the record, and therefore they cannot be considered as any part of the record."

The motions for a new trial and in arrest of judgment and the exceptions to the rulings of the trial court on these motions and of other motions which appear to have been made in the case, should have been preserved by a bill of exceptions. However, it is our opinion that the points made against the validity of the judgment are not well taken. While the verdict of the jury in plaintiff's favor was for $6662.57, the original judgment, which was permitted to stand as security, was for $6450. The court did not err in directing, on this verdict, that the judgment for $6450 was to be in full force and effect as entered. Northampton Coal Company v. Tyrrell, 133 Ill. App. 472. Nor do we believe the court erred in vacating an order which suggested of record the death of one of the defendants. Upon what showing this order was entered or vacated does not appear in the abstract of record; but even if properly presented to this court, the defendant Marie Kular should not be permitted to complain. As the record now stands the judgment

appears to be against two persons; Marie Kolar alone appeals to this court. Whether the personal representatives of Josef Kolar would have legal reason to complain of this act of the court need not be determined here. It is sufficient to say that the action of the trial court does not seem to injuriously affect the interest of the defendant Marie Kolar. She in any event appears to have been liable upon the note sued on. There is no showing or claim that both defendants were not alive at the time the judgment under review here was entered, and the death thereafter of one of the defendants would not affect the lien created by the judgment.

The action of the trial court staying execution upon the judgment did not render the judgment void nor affect any lien created thereby. The court, in the exercise of an equitable supervision over judgments entered by confession, postponed the issuance of the execution thereon for the purpose only of permitting a jury to investigate questions of fact presumably presented on the motion to vacate, and the jury having decided in favor of the plaintiffs, the judgment by the formal entry of an order of court became in full force as of the date of its entry, and issuance of execution thereon was directed. Horton v. Allen, 60 Ill. 306; Miner v. Kaufmann, 134 Ill. 236.

Even if the questions argued in the brief of counsel had been presented to this court in such manner that we could, in accordance with the law and the rules of this court, decide them, we would be inclined to hold that no reversible error had been committed in the trial of the cause, nor in the entry of orders therein.

The judgment of the Superior court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

236 - 27193

ALBERT MISEK,
Appellee,

vs.

THE VILLAGE OF LaGRANGE,
a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, Village of LaGrange, seeks to reverse a judgment for $5,000 entered against it in the Superior court of Cook County and in favor of plaintiff, Albert Misek.

The declaration filed by plaintiff consists of three counts, the first of which alleged that plaintiff was the owner in fee simple of certain real estate in the town of Lyons, County of Cook, together with valuable improvements thereon consisting of buildings, pavilions, etc., which were especially adapted for use as picnic grounds; that the property was located upon and abutting a certain stream of water known as Salt Creek, to which stream plaintiff had riparian rights, including the right to use boats thereon; that plaintiff for five years had used said premises as a picnic park and had derived great profits therefrom; that the defendant, a municipal corporation, and its incorporated territory lay west of the premises of plaintiff; that the defendant "was then and there populous" and it was its duty to dispose of large amounts of sewage originating within its territory, and that in doing so it had built and constructed sewer conduits, ditches and drains so as to dispose of its sewage through sewers into said Salt Creek about 300 feet west and up stream from plaintiff's premises; that the sewage mingled with the waters of the stream, it being a natural water course, and pol-

luted it so as to render it rotten, offensive and poisonous; that the depositing of the sewage in the stream had contaminated it and rendered the premises of plaintiff "useless to plaintiff;" that the casting of the sewage in the stream had become a nuisance to the public at large and to plaintiff in particular; that defendant had appropriated the use of plaintiff's property and his riparian water rights thereto; that plaintiff's premises had been greatly damaged thereby and rendered unfit to the use for which they were adapted and prepared; that the defendant by its conduct "did destroy and damage the use of said lands and appurtenances as a residence place of business and as a picnic park, without leave or license from the plaintiff."

The second count of the declaration alleged that "under the facts alleged in the first count of this declaration, which allegations are made a part hereof, the same as if written out in full," the defendant negligently and carelessly deposited its sewage by conducting it in an offensive condition into the stream, "so that the waters of said Salt Creek were polluted and rendered valueless to plaintiff, and that thereby, by reason of the pollution of said waters of said Salt Creek, and negligently disposing of said sewage as aforesaid, against the rights of plaintiff, the plaintiff has been injured and damaged in his said property in manner and form as aforesaid."

The third count of the declatation, being the count upon which the case was tried, is as follows:

> "For That Whereas Also, in so doing, that is to say, under the facts alleged in the first count of this declaration, which allegations are made a part hereof, the same as if written out in full, the defendant did then and there negligently and carelessly create upon the said premises of the plaintiff, and in said Salt Creek contiguous to and abutting

upon the premises of the plaintiff, a nuisance injurious to the life, health and comfort of the plaintiff and his family, and also injurious to the use of the said premises and said water course for the said purposes. Wherefore plaintiff has been damaged in manner and form as aforesaid, in the sum of Ten Thousand ($10,000.00) Dollars, wherefore he brings his suit."

The evidence introduced on the trial tends to show that the defendant provided a system for collecting sewage from homes and buildings in its territory. This sewage was collected from buildings through pipes into sub-mains, through which it passed into main sewers and thence into a settling tank. The outlet of this tank was but slightly lower than the inlet, so that the tank would be entirely filled with sewage before it would discharge. Certain boards called "baffle boards" set on edge extended across the width of the tank for the purpose of retaining in the tank any solid matter. The liquid matter which flowed out of the settling tank passed into a 15 inch pipe sewer which extended from the tank through the Village of Brookfield and the Village of Lyons and under Salt Creek to what is called in the evidence "the dosing chamber and filter beds." This latter pipe in its course to Salt Creek run parallel to and about eight feet from what is described as the "main or storm water sewer." The sewers were separated by an eight inch concrete wall; the only opening between the two being three valves in the sewer pipe placed at equal distances throughout its length. After the sewage had reached the dosing chamber and filter beds it was submitted to certain processes which, defendant urges, rendered it innocuous. It was then discharged into Salt Creek at a point some distance from the mouth of the storm water sewer and on the other side of the stream.

It was a controverted question of fact on the trial whether the pollution of the stream which caused the alleged damage to plaintiff was brought about by the conduct of defendant, or

whether it was caused by the acts of one or more of the several villages through which the stream passed in its course to its confluence with the Des Plaines river. Several witnesses testifying for the plaintiff gave evidence from which the jury might conclude that the pollution of the stream was caused by the conduct of the defendant. Evidence introduced for the defendant would, on the other hand, if believed, warrant a finding in its favor on this question of fact. As the case is to be sent back for a new trial we express no opinion upon the weight of this evidence nor upon other questions not referred to in this opinion which may not arise upon a retrial of the case.

For the defendant it is asserted that the plaintiff did not have a fee simple title to certain of the premises alleged to have been damaged and used by him in the conduct of his business. We do not think it necessary to discuss this question for the reason that it is asserted in the brief of counsel for plaintiff that plaintiff seeks to recover damages for injuries to the business conducted by him and injury done plaintiff in his use of the premises as a home. The evidence tends to show that part of the premises were owned by plaintiff and his wife as joint tenants, and plaintiff argues in his brief "that no damages were allowed for injury to the fee to the market value, or his wife's interest. The jury were so instructed."

On the trial the court on motion of defendant instructed the jury to disregard the first and second counts of the declaration. The case was tried upon the third count, which alleged in substance that defendant negligently and carelessly created a nuisance which became injurious to the life, health and comfort of the plaintiff and his family, and which also was injurious "to the use of said premises" as a picnic grounds and "said water course for said purposes." Upon this count it then was incumbent upon the plaintiff

to prove that the defendant had been guilty of the negligence charged. The charge of negligence was the only allegation of wrongdoing which was submitted to the jury. Instructions given for the plaintiff informed the jury in substance that the plaintiff was not required under his declaration to prove negligence and instructions tendered on behalf of the defendant touching this question were not given to the jury.

Instruction No. 38 tendered by defendant told the jury that if defendant's sewer was perfectly constructed so as to render harmless anything discharged therefrom and if its officers and servants used ordinary care and caution to keep the system in repair and working order, etc., the plaintiff could not recover. This instruction and others along the same line should have been given.

It was error also to admit evidence under the pleadings of the special damages claimed by plaintiff to his business. These damages are not charged in plaintiff's declaration. Even if it be assumed that the third count of the declaration, by reference, properly included the allegations of the first count, the latter did not allege the specific damages which plaintiff's evidence tended to prove resulted to the business conducted by plaintiff on the premises. The allegation in the first count is that the defendant's misconduct "did destroy and damage the use of said lands and appurtenances as a residence place of business and as a picnic park," and evidence was intriduced for the plaintiff which tended to show that he sustained special damages to the business conducted by him on the premises. These special damages were not alleged in plaintiff's declaration. It is our opinion that plaintiff's right to damages depends upon the allegations of the declaration and that it was reversible error to admit proof of damages not alleged therein.

The law is well settled that in actions based on negligence, the allegations of the declaration and the proof must agree. C. B. & Q. R. R. Co. v. Dickson, 143 Ill. 300. We are not prepared to say, as a matter of law, and if properly pleaded, that plaintiff was not entitled to recover damages done his business by reason of the alleged negligent conduct of the defendant. Forty-two alleged errors are assigned on behalf of the defendant; very many of these are not tenable. Defendant also tendered to the trial Judge no less than forty-five instructions, some of which were properly refused. The large number of assignments of error, some of them quite unnecessary, and the numerous instructions tendered to the trial Judge, only serve to cause confusion and error in the trial of a law suit. We are convinced, however, that it is our duty to reverse the judgment and to send the case back for a new trial. The plaintiff sought to recover a judgment for alleged injuries resulting to his business. It was error under the declaration to admit evidence of the loss or diminution of income of the business conducted on the premises by plaintiff. The defendant, a municipal corporation, would be liable for its negligent exercise of a charter power and for that only. City of Chicago v. Austin, 99 Ill. App. 47; 3 Dillon on Municipal Corporations, sec. 1010; Freeport v. Isbell, 83 Ill. 440.

In the case of McNairy v. Tri City Ry. Co., 204 Ill. 99, theSupreme Court said:

> "The difficulty that appellant encounters is the fact that his declaration is not framed on the theory that appellee was operating a street railway without authority of law. His whole case is predicated upon the assumption that appellee was rightfully using the streets of the city under an ordinance which he sets out in the second and third count of his declaration, and that the injury resulted from the negligent manner of operating the car."

Counsel for plaintiff erroneously conclude that when counts numbers 1 and 3 are taken together the facts charged state a cause of action irrespective of the charge of negligence. An al-

leged assignment of cross error by plaintiff to the effect that the trial court erred in striking the first count of the declaration is not properly presented in this court for decision. The assignment incorporated in the bill of exceptions should have been made in this court by proper assignment of error.

The judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

308 - 27266

BRIGGS & TURVIAS, a Corporation, Appellee, vs. THE FORT WAYNE ROLLING MILL CO., a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

An order was entered in the Municipal court of Chicago in a fourth class action against defendant, which the latter by its appeal to this court seeks to reverse.

October 19, 1920, the trial court entered a judgment by default against defendant for $604.32. February 10, 1921, a special appearance was filed on behalf of defendant for the sole purpose of objecting to the jurisdiction of the court and of moving that the service be quashed and the action against defendant be dismissed on the ground that one M. J. McDonough was not at the time of the alleged service, as recited in the return of the summons, an agent of defendant upon whom service of process might or could be had. April 13, 1921, the motion to quash the service was over-ruled and April 26th an order was entered over-ruling the motion supported by a petition to set aside the order of April 13, 1921, and to vacate the default and judgment entered October 19, 1920. The appeal is from the order entered April 26, 1921. The petition to vacate the judgment and to quash the service was supported by an affidavit of M. J. McDonough, in which he stated that he was a sales broker with offices at 20 W. Jackson boulevard, Chicago; that on the 9th of October, 1920, the date of the alleged service, he was not, and was not at the time the affidavit was made and never had been, an agent of defendant, as recited in the

return of the summons, and that he was not and never had been authorized to accept service of process for or on its behalf, and that the summons was not on October 9, 1920, or at any other time served upon him, as appeared by the endorsement thereon. It was stated in an affidavit of one Agnes M. Grant that she was a stenographer employed by McDonough in his office in Chicago and that on October 9, 1920, a man handed her a copy of the summons and statement of claim filed in the case and requested that she give the same to McDonough. The petition in support of the motion further alleged that the defendant was an Indiana corporation; that it has never transacted business in the State of Illinois and has not at any time maintained an office or place of business therein; that its president, directors and officers all reside in the State of Indiana; that defendant's principal place of business is in Fort Wayne, Indiana, and that it had no agent at any time to represent it in the County of Cook or State of Illinois.

The trial Judge on motion denied the petition to vacate the judgment and to quash the return of the summons. It is our opinion that this was error. The petition and affidavit filed in support thereof, if taken as true, show that the trial court had no jurisdiction to enter a judgment in the cause against the defendant. The return upon the summons is not conclusive against the right of the defendant to appear specially in court and to question the correctness of the return.

In the case of Roop v. Texas Pacific Ry.Co. 250 Ill. 376, the Supreme Court said:

> "A question of the jurisdiction of a court to render a judgment is one of due process of law, and if the defendant was not amenable to service of process within this state the judgment was not rendered in pursuance of the due process of law guaranteed by our constitution. * * * * * * *
>
> "The return of the bailiff was not conclusive of the fact that George W. Fither was the agent of the defendant, and defendant was at liberty to dispute the truth of the return. The conclusion as to that fact depended upon whether the defendant

rights of the accused, and that he was not used twice had been violated by double service of process (in or in the Island), and that the summons was not in conflict with, then, in no way which then appear upon the, as supported by the indictment thereon. It was stated in an affidavit of one Agnes E. Green that, on the a misdemeanor committed by [illegible] in his office on Friday and that on [illegible] 1, 1936, [illegible] for a copy of the summons and statement of [illegible] filed in the case and requested that he give the same to defendant. The petition in support of the motion forever alleges that the defendant was an Indian convicted; that it has never [illegible] Indian in the State of Illinois and has not by any time maintained an office or place of business therein; that its president, directors and officers all reside in the State of Illinois; that defendant's principal place of business is in Fort Wayne, Indiana, and that it had no agent at any time to represent it in the County of Cook or State of Illinois.

The trial judge on motion denied the petition to vacate the judgment and to quash the return of the summons. It is our opinion that this was error. The petition and affidavit filed in support thereof, if taken as true, show that the trial court had no jurisdiction to enter a judgment in the case against the defendant. The return upon the summons is not conclusive against the plea of the defendant to corporate capacity in court and to question the correctness of the return.

In the case of Dent v. Ohio Central Ry. Co., 98 Ill. 375, the Supreme Court said:

> "A question of the jurisdiction of a court to render a judgment is one of the process of law, and if the defendant was not properly in attitude of presenting this case the judgment was not conclusive in attempting to determine of the law questions and constitutions. * * * * * * *
>
> "The return of the sheriff was not conclusive of the fact that Thorpe T. Ritner was the agent of the defendant, and defendant was at liberty to dispute the truth of the return. The [illegible] as to that fact depended upon whether the defendant

had extended its business into this state so as to be constructively present here and was transacting that business through George W. Pither, as its agent. The defendant, being a foreign corporation, could only be served in this state if it was doing business here, and no one could be an agent of the defendant unless he had power to represent it in the transaction of some part of the business contemplated by its charter. There was no one in the state who had power to make any contract or bind the defendant in any way, and the mere solicitation of business by persons who have no other authority is not doing business within this state."

It is urged, however, on behalf of the plaintiff that the return of the sheriff on the summons could only be questioned by a plea in abatement or a plea to the jurisdiction of the court, and counsel rely in some measure upon the case of Clark v. Daniel Hayes Co., 215 Ill. App. 350. In that case the court held that where process is defective on its face or the return of service is of itself insufficient, the defect must be taken advantage of by motion to quash; but where the objection to the return is shown to be by matters dehors the record, the objection must be made by a plea in abatement. This case and other cases cited and relied upon by plaintiff do not deal with a judgment entered in the Municipal court, where common law forms of pleading in actions of the fourth class have been abolished. On the record before us it is not apparent that the defendant corporation was carrying on business in this state, nor that it retained any agent upon whom service of process might legally be had. In so far as the abstract of record shows, the plaintiff did not see fit to question the truth of the affidavits filed in support of the petition. It relies solely upon the fact that the matter was presented to the trial court by motion supported by affidavits and not by plea in abatement or to the jurisdiction of the court. It does not appear from the abstract of record filed in this court that an objection was made in the trial court to the procedure there to vacate the judgment. All that appears is that the trial Judge over-ruled the motion to vacate and set aside the judgment and order of April 16, 1931. The cases relied upon by counsel for defendant do hold in favor of the position urged by him.

Clark v. Daniel Hayes Co., supra, and cases cited therein.

It is our opinion that in the Municipal court of Chicago the return of service on the summons may properly be questioned in that court on motion supported by a petition and affidavits, and that the procedure adopted to question the return was correct.

Section 21 of the Municipal Court act, Cahill's Illinois Statutes, page 1130, provides that judgments of the Municipal court may be vacated or modified in the same manner and to the same extent as judgments of the Circuit court. Provisos to the section, however, appear to assume that the procedure in the Municipal court to vacate a judgment shall be by motion. No written pleadings of any sort were required in the present action in the Municipal court, and this fact alone permitted that court to dispose of the question presented by the petition on motion.

The order denying the motion to vacate the default and judgment of October 19, 1940, and to quash the service is erroneous and will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

Flint v. Stondal Corp. (D.D., Tenn. 1964 Unpublished Opinion).

It is our opinion that in the historical sense of motions the values of service on the economic and corporate in question in this court on motions supported by a petition and affidavit, not that the procedure adopted in question the values and answer.

Section 21 of the Municipal Court Act, Ewalt's Illinois Statutes, page 1191, provides that judgments of the Municipal Court may be vacated or modified in the same manner and on the same motion as judgments of the circuit court. Proceedings in the nature, however, because that the procedure in the Municipal Court is merely a judgment shall be by motion. An written statement of any fact then required in the general motion in the Municipal court, and this fact cannot constituted that error by reason of the notation provided by the written or motion.

The order overruling the motion to vacate the default and judgment of October 22, 1970, and as plead the review is affirmed and will be remanded for the same proceedings.

Affirmed and remanded.

Schwartz, P. J., and Mikva, J., concur.

321 - 27279

Certiorari denied

SAMUEL P. PARMLY,
Appellee,

vs.

JOHN PARSON, Jr., and
WILLIAM PARSON, as Surviving
Partners of PARSON SON & COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

223 I.A. 613

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, Samuel P. Parmly, recovered a judgment in the Circuit court of Cook County against defendants.

The action is based upon allegations of a declaration which in substance charged that defendants by false and fraudulent representations had induced plaintiff to purchase certain bonds of the par value of $5,000 of the Greely-Poudre Irrigation District, Weld County, Colorado.

The case was tried before a jury which returned a verdict for plaintiff for $7,600.00. Judgment was entered on the verdict and defendants appeal to this court.

Several written contracts were introduced in evidence, the first of which in the order of time is what is called in the briefs of counsel the "Construction Contract." This contract was entered into September 3, 1909, between Greely-Poudre Irrigation District, which was organized in 1909 under the laws of the State of Colorado, and the Laramie Poudre Reservoirs & Irrigation Company. The former will be referred to hereinafter as the "District" and the latter as the "Construction Company." This contract provides in substance that the Construction Company was to sell and convey to the District a completed system of canals, ditches, flumes and irrigating systems in accordance with plans and specifications attached to the contract, together with certain water rights, appropriations, etc., in consideration of the delivery to a trustee by the District of bonds of the District of the par value of

176 - 28011

HARRY M. LEVISON,
Appellee,

vs.

WILLIAM J. KENNEDY et al.
On Appeal of WILLIAM J. KENNEDY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

Certiorari

220 Ill. App. 528

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit in forcible detainer begun May 15, 1922, by appellee Levison, the owner of the premises, against appellant Kennedy, who had occupied the premises for several years under a lease which expired by its terms April 30, 1922, and also against certain of his tenants. Kennedy only has appealed from a judgment in plaintiff's favor entered at the close of the evidence upon an instructed verdict.

Defendant Kennedy claimed that he was not holding possession without right but was entitled to the premises under an agreement to give him a ninety-nine year lease to the premises from April 30, 1922, and in support of that defense made proof of the following facts: That on May 26, 1921, Harry Meyer and Harry M. Levison wrote a letter to their agent, Kaplan, authorizing him to negotiate a ninety-nine year lease for the property in question owned by Levison, and adjoining property owned by Meyer; that Kaplan presented the letter to defendant Kennedy June 6, 1921; that a conference was had that day between Kennedy and Meyer and Levison in which certain modifications of the terms of the lease were proposed; that on June 13, 1921, Kennedy wrote a letter accepting the proposition as presented in the letter to Kaplan with such modifications as were thus orally agreed should

be incorporated in the lease, and prepared and signed a lease in accordance with such arrangements, which he presented to Meyer and Levison and which they refused to sign, thus ending negotiations.

Thereafter, on July 16, 1921, Kennedy filed his bill of complaint in the Superior court of Cook County, which was later amended, for a specific performance of the alleged agreement for a ninety-nine year lease as aforesaid. Said bill was dismissed upon a general demurrer, and upon an appeal therefrom to this court the decree was affirmed December 5, 1922. See case No. 27792, Wm. J. Kennedy v. Harry Meyer and Harry M. Levison.

The allegations of the bill in that case, as amended, set forth the same facts as the basis of relief as were introduced in evidence here as a defense in this case. We held in that case that the letter of May 26, 1921, merely authorized Kaplan to negotiate a ninety-nine year lease but conferred no power upon him to enter into any agreement for such a lease, and that the allegations of the bill showed that if there was ever any agreement for a lease from Meyer and Levison to Kennedy it was made orally in the course of the conversation between them and Kennedy, and not being evidenced in any writing whatever signed by Meyer and Levison the alleged agreement rested partly in writing and partly in parol and was therefore void under the Statute of Frauds, and consequently no action could be maintained thereon.

Presumably it was upon the same theory that the court below instructed a verdict for plaintiffs, for an agreement that is void under the Statute of Frauds cannot be made a ground of defense to an action by the landlord to recover possession of the premises. (Creighton v. Sanders, 89 Ill. 543.)

Appellant also urges that there was no demand made

upon him for possession of the premises. It is settled law that none is required where the lease has expired by its terms and the tenant holds over without the landlord's consent.

The judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

197 - 28032

EDWARD C. JACOBS,
Appellee,

vs.

O. J. SMITH,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages to plaintiff's automobile resulting from a collision between defendant's truck, a two and one-half ton Packard, and a one-half ton Ford truck belonging to one Weiss, while said trucks were passing one another opposite to where plaintiff's automobile was parked close to the east curb of the street.

The street ran north and south and was wet and slippery, and as the two trucks came near the point of collision, the Packard from the south and the Ford from the north, the driver of the latter put on his brakes, causing his truck to skid into the former and throw it against plaintiff's automobile.

There is no material controversy of fact. The driveway was 20 feet wide. The width of the Ford truck was 4 or 5 feet, and that of the Packard 7 feet. With careful driving there was room for both to pass between the car and the opposite side of the driveway. Both cars were driven at a moderate speed, about 10 miles per hour, and each driver had the right to continue on his course if he drove carefully. There is nothing to indicate that defendant's driver, who kept well to his side of the road within a foot or two of plaintiff's car, did not drive carefully.

If there was any negligence it would appear to have been on the part of the driver of the Weiss car, a boy 18 years old who had driven a car only about 3 weeks, and who testified that as he approached within 20 feet of plaintiff's car and saw the other truck about the same distance approaching from the other side of it he feared a collision and put on the brakes, causing his car to skid into defendant's and to throw the latter against plaintiff's. But for putting on his brakes there probably would have been no accident. For that act defendant's driver was not responsible, and no negligence can be chargeable to him unless under the circumstances it can be said he should have stopped his car and let the other pass. But the latter had no superior right of way. If one of the cars should have stopped, it naturally was the lighter one, which was easier to stop. We are unable to say that the exercise of due care required both of them to stop or either to anticipate the possible careless driving of the other if, as there seems, there was sufficient room to pass. An experienced driver would hardly have put on his brakes under such circumstances, and defendant's driver might well have assumed that the other driver would exercise ordinary care and not do so. We fail to see that there is anything in the state of facts which shows negligence per se on the part of defendant's driver.

Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Merrill and Gridley, JJ., concur.

FINDING OF FACT.

We find that appellant, O. J. Smith, was not guilty of negligence whereby plaintiff's automobile was injured.

216 - 28051

ANTHONY W. FRISBIE,
Appellee,

vs.

ROSE DeKRAUKE,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

Certiorari denied

229 I.A. 628

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer. Appellant has been in possession of the premises under various owners since 1911, without any formal renewal of the lease until November 30, 1918, when she accepted a lease from appellee's grantor to expire April 30, 1920, under which she paid rent until its expiration but none thereafter. On June 8, 1920, the then owner of the property leased the same to the plaintiff in this suit.

This appeal is from a judgment for plaintiff. Defendant claimed that when she signed the lease of November 30, 1918, there was an oral agreement to insert therein a provision giving her six months notice "to move out," which was never inserted. Upon the familiar principle that parol testimony will not be received to vary the terms of a written instrument, an offer to prove such claim was properly rejected. Defendant was holding under a written lease. If it did not express the agreement of the parties her remedy was to have it reformed.

The court also properly rejected appellant's offers to prove the following state of facts: That about March 26, 1920, the agent of her lessor (a Mrs. Wallace, then owner of the property) told appellant that he had been offered higher rent from May 1, 1920, and wanted to know if she could meet the same terms, and four days later informed her that he would give her a lease for three years

from May 1, 1920, upon these rates, and that she would not have to move from the property on May 1, 1920; that appellant received a letter from said agent, dated March 31, 1920, advising her that he had leased the premises to appellee, and that appellee was willing to give her the space she needed at a reasonable rent; that on April 1, 1920, said agent showed a copy of that letter to appellee, who protested against the agent's writing it but did not communicate with her regarding the matter, and that in May, 1920, the private secretary of said agent told her that the agent said he had forgotten to insert in the lease of November 30, 1918, the provision for six months notice as aforesaid.

We fail to see wherein any of these offers was material. The effect of most of them would be to vary the written contract by parol evidence. The alleged negotiations for a three year lease was at most an offer to prove a verbal agreement not to be performed within one year, and was manifestly incompetent as contravening the statute of frauds. The agent's statement that appellant would not have to move from the premises May 1, 1920, at the expiration of her lease was not binding upon the lessor, if made. The lease was an executory contract under seal and could not be modified or varied by parol; and, besides, there was no consideration therefor. (Leach v. Farnum, 90 Ill. 368.) Nor does it appear in the record or in the offer that said agent was the agent of appellee Frisbie, or had any authority to bind him with respect to appellant remaining on the property. Besides, such an arrangement would not be valid beyond a year therefrom, and this suit was not begun until June 17, 1921. Of course, the offer to prove what the secretary of the agent told appellant was properly rejected as hearsay, and was otherwise immaterial, the purpose thereof being to vary by parol testimony the terms of the written instrument as to notice to quit.

Prior to 1, 1936, upon force price, but that did would not have to have from the property on May 1, 1936; that supplied received a letter from said court, dated March 26, 1937, advising that that he had issued the premises to question, or that question was willing to give her the same the issues of a reasonable cost; that on April 1, 1936, will upon showed a copy of that lease to appellee, who protested against the landlord's setting it but did not communicate with the tenants the notice, and that in May, 1936, the business manager of that agent told her that she agree only to pay increase to income in the lease of December 26, 1935, the provision for a month notice is alternative.

To fail to see therein any of these criteria was unfair. The effect of such a lease could be to vary the written contract by parol evidence. The alleged modification for a three year lease was at most an offer to prove a verbal modification to be performed within one year, and was manifestly incompetent as contravening the statute of frauds. The agent's testimony that appellant verbal had been in note from the previous May 1, 1935, at the expiration of her lease was not admissible upon the issue, it tends.

IX Ends. The lease was an executory contract which had not been modified or varied by parol; and, besides, there was no consideration therefor. (Lamb v. Lemon, 26 Ill. App. 301.) Nor does it appear in the record or in the after that all agent was the agent of appellee Frisch, or had any authority to bind him with respect to appellant remaining on the property. Besides, such an arrangement would not be valid upon a year's tenancy, and this suit was not begun until June 17, 1936. If proper, the offer to prove that the secretary of the agent this appellant was actually injured as damage, not was otherwise immaterial. The reasons listed being to vary by parol testimony the terms of the written instrument as to notice to quit.

We fail to see in any of the matters thus offered to be proven any elements of estoppel from evicting appellant from the premises. There is nothing to show that plaintiff was induced to change her position at any time from any of the statements thus offered to be proven.

Accordingly the judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

27 - 27840

SAMUEL N. PINCUS, MAX RIPAS and JOHN C. EDMUNDS, Appellants,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
AVEDICK G. BALOIAN, Appellee.	)	OF CHICAGO.

223 I.A. 6284

MR. JUSTICE GRIFFIN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment, entered January 28, 1922, by the Municipal Court of Chicago against plaintiffs in a forcible detainer suit, after the verdict of a jury finding defendant not guilty of unlawfully withholding from plaintiffs the possession of certain premises.

It appears that in March, 1918, one Daniel T. Rose leased the premises to defendant for a term of ten years, beginning May 1, 1918, and ending April 30, 1928, at $70 per month for the first three years, at $75 per month for the following four years, and at an increased monthly rental for the balance of the term; that it was provided in the lease that defendant should pay rent in advance on the first day of each month; that plaintiffs, in the autumn of 1921, became the owners of the premises, - Rose assigning said lease and the rent secured thereby to them; that defendant had been in the habit each month of paying the rent on a day subsequent to the first; that on or about October 25, 1921, defendant received a letter from the Broadway Realty Co. (agent of plaintiffs to collect rents and hereinafter referred to as the Realty Co.) notifying him to pay the rent to it "on the first day of each month until otherwise notified," and that on November 8, 1921, defendant paid the November rent, which was accepted by the Realty Co., and on the following day he re-

This is an appeal from a judgment, entered January 26, 1922, by the municipal court of Chicago against defendant in a forcible detainer suit, after the verdict of a jury finding defendant not guilty of unlawfully withholding from plaintiffs the possession of certain premises.

It appears that in April, 1921, we leased to one Lessee the premises in dispute for a term of two years, beginning May 1, 1922, and ending April 30, 1924, at $60 per month for the first three years, at $75 per month for the following four years, and at an increased monthly rental for the balance of the term; that it was provided in the lease that defendant should pay rent in advance on the first day of each month; that plaintiffs, in the summer of 1923, became the owners of the premises, - lease assigning said lease and the rent accrued thereby to them; that no amount had been in the habit each month of paying the rent on a day subsequent to the first; that on or about October 26, 1923, defendant received a letter from the property manager, lessee of plaintiffs to collect rents and thereinafter referred to as the lessor, notifying him to pay the rent to it on the first day of each month until otherwise notified," and that on November 8, 1923, defendant paid the November rent, which was accepted by the lessor, and on the following day he received a letter from the lessor, and on the following day he received a letter from the lessee, notifying him that the rent should be paid to the lessee, and that on November 26, 1923, defendant paid the November rent to the lessee, which was accepted by the lessee.

ceived in the mail a receipt from the Realty Co. for the same.

Representatives of the Realty Co. testified that on November 8th, it wrote a letter to defendant, placed it in the same envelope with the receipt, and duly mailed it. A purported copy of this letter was admitted in evidence, and was to the effect that defendant had been informed by the letter of October 25th that his rent was payable on the first day of each month according to the lease, and that defendant's payment of the November rent "at this late date" was accepted by the Realty Co. "only on the understanding that you pay your rent in the future on the first", and that defendant's failure to comply would mean a forfeiture of the lease. Defendant's testimony was to the effect that no such letter was received; that early in December a representative of the Realty Co., named Smith, was at defendant's place of business and he stated that it would be satisfactory if defendant paid the rent by the 10th of the month; that defendant sent a check for $75 to the Realty Co. on December 8th in payment of the December rent, which was received on December 9th and refused and returned by the Realty Co.; and that the defendant immediately thereafter tendered the amount of the December rent in cash, which the Realty Co. also refused. Smith, in rebuttal, denied that he at any time stated to defendant that the latter's rent could be paid by the 10th of the month.

The action was commenced on December 23, 1921. Plaintiffs claimed that they were entitled to forfeit the lease because defendant did not pay the December rent on the first day of the month. Plaintiffs also claimed that defendant failed to pay certain water taxes, but as the question of such alleged non-payment is not discussed in the brief and argument here filed by plaintiffs' counsel further reference to it need not be made. We think it clear under the evidence that plaintiffs

ceived in the mail a receipt from the Realty Co. for the rent.

Representatives of the Realty Co. testified that on November 6th, it wrote a letter to defendant, placed it in the same envelope with the receipt, and duly mailed it. A purported copy of this letter was admitted in evidence, and was to the effect that defendant had been informed by the letter of October 30th that his rent was payable on the first day of each month according to the lease, and that defendant's payment of the November rent "at this late date" was accepted by the Realty Co. "only at the administrative level and was just that is the first on the first", and that defendant's failure to comply would mean a forfeiture of the lease. Defendant's testimony was to the effect that he much better was receiving; that early in December a representative of the Realty Co., named Smith, was at defendant's place of business and he (Smith) said he would be satisfactory if defendant paid the rent by the 5th of the month; that defendant sent a check for 275 to the Realty Co. in accordance with payment of the November rent, which was received on December 9th and returned and returned by the Realty Co.; and that the defendant immediately thereafter tendered the amount of the December rent in cash, which the Realty Co. also refused.

The action was commenced on December 21, 1971. Plaintiffs claimed that they were entitled to forfeit the lease because defendant did not pay the December rent on the first day of the month. Plaintiffs also claimed that defendant failed to pay certain water taxes, but on the question of such alleged non-payment is not discussed in the brief and argument here filed by plaintiffs' counsel further reference to it need not be made. We think it clear under the evidence that plaintiffs

were not entitled to declare a forfeiture of the lease and regain possession of the premises in the present action on the ground of defendant's failure to pay the December rent on the first day of that month. He had been accustomed to pay the monthly rent, without objection by the former landlord, on a day subsequent to the first day, and even after the notice of the Realty Co. of October 25, 1921, the November rent, paid on the 8th of the month, was received by plaintiffs' agent. There was only prima facie evidence of defendant's receipt of the purported letter of the Realty Co. of November 8th, and the presumption of its receipt could be rebutted, as was done in this case. (Meyer v. Krohn, 114 Ill. 574, 586.) We think that the verdict of the jury was fully warranted by the evidence.

After Smith had testified in rebuttal to the effect that he never stated to defendant, or defendant's representative, that the rent could be paid by the 10th day of the month, he was asked by plaintiffs' attorney "Did you have authority to make any such statement?" The objection to the question was sustained by the Court, and it is here urged that such ruling constituted error. We do not think so. It called for the conclusion of the witness as to what his authority was. (Gilmore v. Farmer, 156 Ill. App. 70; Elevator Safety Device Co. v. Brown-Ketcham Iron Works, 153 Ill. App. 313.)

It is further urged that a certain statement of defendant's attorney, made during the progress of the trial and in the hearing of the jury, was so prejudicial as to warrant a reversal of the judgment. It appears that, after plaintiffs' witness, Smith, had entered the court room, plaintiffs' attorney had a conference with him in the sight of the jury, and defendant's attorney said: "He is coaching his witness." The court at once severely reprimanded defendant's attorney and said: "Counsel

were not entitled to declare a forfeiture of the lease and right of possession of the premises in the present action on the ground of defendant's failure to pay the January rent on the first day of said month. In his trial statement to all the material fact, without objection by the Tenant-Landlord, as a day subsequent to the first day, and even after the notice of the Monthly co. of October 27, 1972, the Director rent, just as the 8th of the month, was received by plaintiff's agent. There was only under Lease evidence of defendant's receipt of the payment prior of the lease to, or receipt of, and the proximation of its receipt could be rejected, so we have in this case. (Moore v. Krohn, 116 III. 274, 284.) We think the verdict of the jury was fully warranted by the evidence.

After much but unfitness is rejected in the office that is never should be delivered, or defendant's representative, that the rent could be paid by the 10th day of the month, he was asked by plaintiff's attorney "Did you have authority to make any such statement?" The objection to the question was sustained by the Court, and it is here urged that such ruling constituted error. We do not think so. It called for the conclusion of the witness as to what his authority was. (Hilmer v. Stone, 140 Ill. App. 70; Hilmer Safety Brake Co. v. Brownsville Ins. Co., 148 Ill. App. 318.)

It is further urged that a certain statement of defendant's attorney, made during the progress of the trial and in the hearing of the jury, was so prejudicial as to warrant a reversal of the judgment. "Is you's Mr. Jones' authority?" asked. And entered the court room, plaintiff's attorney had a conference with him in the sight of the jury, and defendant's attorney said: "He is according his witness." The court at once severely reprimanded defendant's attorney and said: "Counsel

has a right before putting his witness on the stand to talk to him; you wouldn't put a witness on the stand without talking to him, would you?" Whereupon defendant's attorney said: "All right, your Honor, I will stand corrected." In view of the court's reprimand, the colloquy which followed and the facts in evidence, we do not think that the statement influenced the verdict, or that on account of it the judgment should be reversed. (Chicago City Ry. Co. v. Ratner, 133 Ill. App. 628, 634; City of Chicago v. Lesath, 142 Ill. 642, 643.)

It is further urged that the court erred in refusing to allow plaintiffs to call Leon Baloian, brother and an employee of defendant, as a witness and cross-examine him under section 33 of the Municipal Court Act. In this ruling the court committed no error, as Leon Baloian was not a party to the suit, or a person for whose immediate benefit the suit was being prosecuted or defended, and no corporation was a party to the suit of which he was a director, officer, superintendent or managing agent. The section of the Act only applies to those persons specifically mentioned therein. (Kaestner & Co. v. Pope, 152 Ill. App. 22, 23.)

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

Had a right before testimony was given on the issue of duty to be done; who decided? Did a citizen be the issue without filing to be done, could court [illegible] defendant's testimony [illegible] right? Right, your Honor, I will stand corrected. In view of the court's decision, the criminal case failed and the first [illegible] criminal, or in the text that the statement influenced the verdict, or that on account of it the judgment should be reversed. (Citing Ex Ex, Cos. v. Hubert, 100 Iii. App. 498, 499; City of Elgin v. Joseph, 140 Iii. 449, 451.)

It is further argued that the court erred in refusing to allow plaintiff to call John Doe[illegible], [illegible] and employee of defendant, and a witness who corroborated the [illegible] of the municipal court. In this [illegible] the court sustained the error, as John Doe[illegible] was not a party to the suit, or a person for whose benefit [illegible] the suit was being prosecuted or defended, and no [illegible] was a party to the [illegible] of which he was a [illegible], officer, [illegible] or [illegible]. The evidence of the [illegible] only [illegible] to those matters [illegible] [illegible]. (Hubert v. Ex, 100 Iii. App. [illegible].)

Finding no reversible error in the record, the judgment of the municipal court is affirmed.

AFFIRMED.

[illegible], P. J., and [illegible], J., concur.

87 - 27919

JOHN JAY FOX and WILLIAM P. FOX, copartners doing business under the name of Fox & Fox, Appellees, vs. THE NOVAK GROCERY COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $550, rendered against defendant after verdict by the Municipal Court of Chicago on May 20, 1922, in an action of the 4th class in contract, for services rendered by plaintiffs as architects.

In plaintiffs' statement of claim, filed January 31, 1921, it is alleged that the sum of $550 is due them as fees for their professional services as licensed architects, rendered at defendant's request in October, 1920, in and about the preparation of plans, specifications and estimates for the proposed alteration of defendant's building on North Peoria street in the City of Chicago. The defense was, as disclosed from defendant's affidavit of merits and from the testimony of its witnesses on the trial, that plaintiffs had never prepared any plans, specifications or estimates at the request of defendant.

The only point made and argued is that the verdict is manifestly against the weight of the evidence. It is urged that the verdict rests upon the unsupported testimony of John J. Fox, one of the plaintiffs, which is contradicted by the testimony of three witnesses called by defendant. It is not disputed that plaintiffs performed the services of the value of $550. The

conflicting testimony is upon the material question whether defendant, by its president and another officer, requested plaintiffs to prepare said plans, specifications and estimates. After a careful reading of all the evidence, as disclosed in the printed abstract of the record, we think that the testimony of said Fox is supported by other evidence, and, although the evidence is most contradictory on said material question, we are unable to say that the verdict is manifestly against the weight of the evidence or that the judgment should be disturbed. (Russell v. Sycamore Marsh Harvester Co., 55 Ill. 333; 334; Shutt Improvement Co. v. Thompson, 109 Ill. App. 540, 542.)

Accordingly the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

materiality, whether in open or material question, whether defendant, by his pleadings and another action, requested plaintiff to produce said plans, specifications and drawings, after a careful reading of all the evidence, as disclosed in the printed abstract of the record, we think that the testimony of said Fox is supported by other evidence, and, although the evidence is most contradictory on such material questions, we are unable to say that the verdict is exactly the opposite the weight of the evidence or that the judgment should be disturbed. (Bassett v. Chicago Burlington Co., 61 Ill. 324; Wolf; Short Improvement Co. v. Chamberlin, 208 Ill. 49, 56, 69.)

Accordingly the judgment of the municipal court is affirmed.

AFFIRMED.

Barnes, J., and Morrill, J., concur.

95 - 27927

DEMETRIOUS G. STAVROPOULOS, Defendant in Error, vs. HAROLAMBOS STAVROPOULOS, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse the judgment order of the Superior Court of Cook County, entered March 20, 1922, striking defendant's plea from the files for want of a sufficient affidavit of merits, defaulting him for want of a plea, and entering judgment against him in the sum of $346, being the amount stated to be due plaintiff in his affidavit of claim attached to his declaration.

From this judgment, defendant, by his attorney, prayed an appeal to this appellate court which was allowed upon his filing an appeal bond in the sum of $600 within 30 days. He was given 60 days within which to file a bill of exceptions. He did not perfect his appeal in the Superior Court, but within the required time he did file a bill of exceptions, duly signed and sealed by the trial judge.

On September 19, 1921, plaintiff commenced an assumpsit action against defendant, and on the same day filed an affidavit for an attachment in aid on the ground of defendant's non-residence, and also a declaration, consisting of a special count on an alleged promissory note for $300 and the common counts. Attached to the declaration is an affidavit of the amount due, in which it is stated that plaintiff's demand is for money loaned, to-wit: $300, to defendant, and that

JURISDICTION OF STATUTORY CONSTRUCTION.

Judgment in favor.

ORDER TO

VS.

DISMISS CLAIM OF

ELDORADO STATUTORY CONSTRUCTION.

COOK COUNTY.

Plaintiff in Error.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT:

It is sought by this writ of error to reverse the judgment order of the superior court of Cook County, entered March 27, 1922, vacating defendant's writ from the filing for want of a sufficient affidavit of merits, defaulting him for want of a plea, and entering judgment against him in the sum of $1,000, being the amount stated to be due plaintiff in his affidavit of claim attached to the declaration.

From this judgment, defendant, by his attorney, prayed an appeal to this appellate court which was allowed upon his filing an appeal bond in the sum of $200 on July 27, 1922. He was given 30 days within which to file a bill of exceptions. He did not perfect his appeal in the superior court, but within the required time he did file a bill of exceptions, duly signed and sealed by the trial judge.

On September 17, 1922, plaintiff in error moved to dismiss writ of error, for the same his affidavit of merits for an attachment in aid on the ground of defendant's non-residence, and also a misnomer, consisting of a special count on an alleged promissory note for $1000 and the common counts. Attached to the declaration is an affidavit of the amount due, in which it is stated that plaintiff's demand is for money loaned, to-wit: $1000, to defendant, and that

there is due from defendant the sum of $346. Attached to the declaration, also, is a copy of the alleged note, as follows: "Chicago, July 31, 1918; Harolambos Stavropoulos, the undersigned, owes Demetrious Stavropoulos Three Hundred Dollars, and he promises to pay Demetrious Stavropoulos. (Signed) Harolambos Stavropoulos." The attachment writ was levied on certain real estate in Cook County belonging to defendant. The writ of summons was returned "not found." On November 8, 1921, judgment by default on publication was entered for $346. Shortly before the expiration of the term at which said judgment was entered, defendant, by his attorney, appeared and moved for the vacation of the judgment, and on December 10, 1921, on affidavit of George Stavropoulos being filed, the court entered an order, based upon said affidavit, vacating the judgment, giving defendant leave to plead to the merits within 30 days and staying the attachment proceedings.

The material allegations of said affidavit are in substance as follows: That affiant is defendant's duly authorized agent; that defendant is a resident of Chicago, Illinois, and has been for 30 years past, and that at the time of the beginning of the suit was temporarily absent from Chicago and was in the Kingdom of Greece, of which facts plaintiff, the nephew of defendant, had knowledge when he instituted the suit and caused the writ of attachment to be issued; that notice of the pendency of the suit was sent to defendant at Vassara, Greece, and he there received it about October 18, 1921, too late for him to file an appearance in the cause before the judgment of November 8, 1921, was entered; that on November 22, 1921, affiant received a letter from defendant, written from Vassara, Greece, (copy of letter attached) in which defendant stated in substance he had received the notice, that he had settled with plaintiff and owed him nothing, that he

there is due from defendant the sum of $246. Attached to the declaration, also, is a copy of the alleged note, as follows: "Chicago, July 22, 1919; Konstantinos Georgoulis, the undersigned, owe Demetrious Pievrogoulis Three Hundred Dollars, and he promises to pay Demetrious Pievrogoulis. (Signed) Konstantinos Pievrogoulos." The attachment writ was levied on certain real estate in Cook County belonging to defendant. The writ of summons was returned "not found." On November 6, 1931, judgment by default on publication was entered for $246. Shortly before the expiration of the term at which said judgment was entered, defendant, by his attorney, appeared and moved for the vacation of the judgment, and on December 10, 1931, an affidavit of George Pievropoulos being filed, the court entered an order, based upon said affidavit, vacating the judgment, giving defendant leave to plead to the merits within 10 days and staying the attachment proceedings.

The material allegations of said affidavit are in substance as follows: That affiant is defendant's duly authorized agent; that defendant is a resident of Chicago, Illinois, and has been for 25 years past, and that at the time of the beginning of the suit was temporarily absent from Chicago and was in the Kingdom of Greece, of which facts plaintiff, the nephew of defendant, had knowledge when he instituted the suit and caused the writ of attachment to be issued; that notice of the pendency of the suit was sent to defendant at Vasaro, Greece, and he there received it about October 18, 1931, too late for him to file an appearance in the cause before the judgment of November 6, 1931, was entered; that on November 21, 1931, affiant received a letter from defendant, written from Vasaro, Greece, (copy of letter attached) in which defendant stated in substance he had received the notice, that he had settled with plaintiff and owed him nothing, that he

would be back in Chicago in the following spring, and that affiant should procure an attorney and defend the action; that from 1914 to 1917 plaintiff lived in defendant's home and worked for him in his grocery business in Chicago; that from 1917 to July 1, 1920 plaintiff worked for this affiant; that on July 31, 1918, defendant gave plaintiff the written memorandum which is the basis of the present suit; that on the day before defendant left Chicago for Greece he, at his home and in the presence of affiant, paid plaintiff by check the sum of $95, which was the balance then due plaintiff, in full payment and satisfaction, and which check plaintiff thereafter cashed; and that at that time plaintiff told defendant that said memorandum had been lost, and subsequently told affiant that he had been unable to find the same.

On December 23, 1921, within the time allowed, defendant, by an attorney, filed a plea of the general issue, supported by the affidavit of said George Stavropoulos that he "verily believes that the defendant has a good defense upon the merits to the whole of the plaintiff's demand."

On March 20, 1922, on motion of plaintiff's attorney, the judgment order complained of was entered. The bill of exceptions discloses that on said day there was a hearing on the motion, during which it appeared that immediately after the order of December 10, 1921, was entered, vacating said prior judgment and giving leave to defendant to plead to the merits, defendant's attorney sued out a <u>dedimus</u>, directed to a judge, justice of the peace or commissioner in Greece, to take the deposition of defendant in that country where he then was, and also giving XXXX written instructions; that these instructions were not complied with and, instead of the commissioner taking the deposition and returning it with the <u>dedimus</u>, he merely made out defendant's affidavit and forwarded the same to defendant's son at Chicago, who had recently received it. The court expressed the opinion that sufficient

would be sold in Chicago in the following spring, and that affiant would account as attorney and refund the [illegible]; that from 1914 to 1917 plaintiff lived in defendant's home and worked for him in his grocery business in Chicago; that from 1917 to July 1, 1920 plaintiff worked for this affiant; that on July 21, 1920, defendant gave plaintiff the written memorandum which is the basis of the present suit; that on the day before defendant left Chicago for Greece he, at his home and in the presence of affiant, paid plaintiff by check the sum of $50, which was the balance then due plaintiff, in full payment and satisfaction, and which check plaintiff thereafter cashed; and that at that time plaintiff told defendant that said memorandum had been lost, and subsequently told affiant that he had been unable to find the same.

On December 10, 1921, within the time allowed, defendant, by an attorney, filed a plea of the general issue, supported by the affidavit of said George [illegible] that he verily believed that the defendant has a good defense upon the merits to the whole of the plaintiff's demand."

On March 20, 1922, on motion of plaintiff's attorney, the judgment order complained of was entered. The bill of exceptions discloses that on said day there was a hearing on the motion, during which it appeared that immediately after the order of December 10, 1921, was entered, vacating said prior judgment and giving leave to defendant to plead to the merits, defendant's attorney sued out a dedimus, directed to a judge, justice of the peace or commissioner in Greece, to take the deposition of defendant in that country where he then was, and also giving XXXX written instructions; that these instructions were not complied with and, instead of the commissioner taking the deposition and returning it with the dedimus, he merely made out defendant's affidavit and forwarded the same to defendant's son at Chicago, who had recently received it. The court expressed the opinion that said affidavit

diligence had not been shown, but, after defendant's attorney had stated that defendant would be back in Chicago in the following May, said that if defendant's attorney would pay plaintiff's attorney the sum of $50 as attorney's fees he would continue the case until May. Thereupon defendant's attorney said that he had no authority to make such payment, and, upon his attention being called to the fact that defendant's affidavit of defense accompanying his plea was faulty in not specifying the nature of such defense, as provided in section 55 of the Practice Act, asked leave to file an amended affidavit of defense instanter, but the court refused the request and over objection entered the judgment order in question.

Under the facts and circumstances disclosed we are of the opinion that the court abused its discretion in not allowing the amended affidavit of defense to be filed on behalf of defendant and in entering said judgment order (Misch v. McAlpine, 78 Ill. 507; Chicago-Virden Coal Co. v. Bradley, 134 Ill. App. 234.) Although the affidavit of defense accompanying defendant's plea was faulty, there was on file an affidavit, made by the same affiant, which, if true, disclosed a full and complete defense to plaintiff's said claim. And defendant, although absent from the country, was at least entitled, before any judgment should be rendered against him, to have plaintiff testify under oath to his claim and be cross-examined by defendant's attorney. And we do not think that under the circumstances the court's action can be justified on the ground of lack of diligence on the part of defendant's attorney.

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded for a trial upon the merits.

REVERSED AND REMANDED.

dilligence had not been shown, but, after defendant's attorney had stated that defendant would be back in Illinois in the following May, said that if defendant's attorney would pay plaintiff's attorney the sum of $10 as attorney's fee he would continue the case until May. Thereupon defendant's attorney said that he had no authority to make such payment, and, upon his attorney being called to the fact that defendant's affidavit of defense accompanying his plea of "Joint in and concerning the nature of such defense, as provided in section 24 of the Justices Act, asked leave to file an amended affidavit of defense instanter, but the court refused the request and over objection entered the judgment order in question.

Under the facts and circumstances disclosed we are of the opinion that the court abused its discretion in not allowing the amended affidavit of defense to be filed on behalf of defendant and in entering said judgment order (Hall v. Hopkins, 12 Ill. App. 307; Chicago-Lyden Coal Co. v. Kraft, 241 Ill. App. 464.) Although the affidavit of defense presented in defendant's plea was faulty, there was no file an affidavit, even if the same affidavit, if true, disclosed a full and meritorious defense to plaintiff's said claim. And defendant, although chosen from his residence, was at least entitled, before any judgment should be rendered against him, to have additional facility under oath to his claim and be cross-examined by plaintiff's attorney. And we do not think that under the circumstances the court's action can be justified on the ground of lack of diligence on the part of defendant's attorney.

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded for a trial upon the merits.

Reversed and remanded.

129 - 27963

WAPLES PLATTER GROCERY CO., a corporation, Appellant, vs. ROBERT L. STEFFEY and D. R. STEFFEY, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a contract action of the 4th class against Robert L. Steffey and D. R. Steffey, alleged in its amended statement of claim that it received from D. R. Steffey a certain guaranty in writing addressed to it at Fort Worth, Texas, dated Chicago, December 30, 1919, and signed "Steffey Bros., per D. R. Steffey" as follows:

> "As my son, Robert L. Steffey, intends going into the restaurant business in your town or some nearby town and wishes me to guarantee his account for goods that he may purchase from you, will say that I will guarantee it for the sum of $500, and any information you may wish to know about me will say that I am sole proprietor of Steffey Bros., of 118-120 W. South Water St., doing business with the First National Bank. Any little favor that you may show him will be appreciated by him. You have nothing to lose by giving him this small line of credit, as you will find that I am responsible for all that I guarantee."

Plaintiff further alleged that, pursuant to said guaranty and from time to time during the early part of the year, 1920, and up to and including March 23, 1920, it furnished to Robert L. Steffey, at his request, certain goods and merchandise, and that the balance due plaintiff therefor is $476.77.

In D. R. Steffey's affidavit of merits, entitled "Waples Platter Grocery Co., v. D. R. Steffey, impleaded with Robert L. Steffey", and sworn to by his agent, it is alleged that plaintiff did not sell to Robert L. Steffey the goods and merchandise mentioned and that neither Robert L. Steffey or D. R. Steffey is

[illegible] - [illegible]

FLETCHER GROCERY COMPANY,
a corporation,
Appellant,

vs.

ROBERT L. SHELLEY and
D. S. SHELLEY,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a contract action of the 4th class against Robert L. Shelley and D. S. Shelley, alleged in its amended statement of claim that it received from D. S. Shelley a certain guaranty in writing addressed to it at Fort Worth, Texas, dated Illinois, December 10, 1927, and signed "Shelley Bros., per D. S. Shelley" as follows:

> "As my son, Robert L. Shelley, intends going into the restaurant business in your town or some nearby town and wishes me to guarantee his account for goods that he may purchase from you, will say that I will guarantee it for the sum of $500, and any information you may wish in reference to will say that I am sole proprietor of Shelley Bros., at 111-113 N. North Main St., doing business with the First National Bank. Any little favor that you may show him will be appreciated by him. You have nothing to lose by giving him this small line of credit, as you will find that I am responsible for all that I guarantee."

Plaintiff further alleged that, pursuant to said guaranty and from time to time during the early part of the year, 1930, and up to and including March 22, 1930, it furnished to Robert L. Shelley, at his request, certain goods and merchandise, and that the balance due plaintiff therefor is $470.77.

In D. S. Shelley's affidavit of merits, entitled "Fletcher Grocery Co., v. D. S. Shelley, impleaded with Robert L. Shelley", and sworn to by his agent, it is alleged that plaintiff did not sell to Robert L. Shelley the goods and merchandise mentioned and that neither Robert L. Shelley or D. S. Shelley is

indebted to plaintiff in said sum. There is no denial of the execution and delivery of said guaranty by D. R. Steffey.

The cause was tried before the court without a jury. Evidence was introduced by plaintiff showing the sale and delivery of the goods to Robert L. Steffey at Ranger, Texas, at his request, that there was a balance due plaintiff therefor of $476.77, and that in extending the credit to Robert L. Steffey it relied upon said undisputed written guaranty of D. R. Steffey. Thereupon plaintiff's attorney, in resting his case, asked leave to dismiss the suit as to the defendant, Robert L. Steffey. Although the attorney representing both defendants stated that he had no objection to the granting of the motion, the court refused to grant it and suggested that he would permit plaintiff to take a nonsuit. Upon the refusal of plaintiff's attorney to adopt the suggestion the court found the issues against plaintiff, entered judgment on the finding, and plaintiff appealed.

Plaintiff's amended statement of claim disclosed that its claim, upon which the parties went to trial, was upon the written guaranty of D. R. Steffey. To such an action Robert L. Steffey was not a necessary party, and at any time before final judgment plaintiff was privileged to discontinue the action as to him and proceed against D. R. Steffey alone. (Sec. 39 Practice Act; Mayer v. Brensinger, 180 Ill. 110, 118; Kaspar v. People, 230 Ill. 342, 355; Malleable Iron Range Co. v. Fusey, 148 Ill. App. 344, 348.) The trial court erred in not allowing the dismissal of the action as to Robert L. Steffey and in entering the finding and judgment against plaintiff.

It is urged by plaintiff's counsel that this appellate court should here enter judgment in plaintiff's favor against D. R. Steffey for said balance of $476.77. We would not be justified in taking such action. Only plaintiff's evidence was heard. This

indebted to plaintiff in said sum. There is no denial of the execution and delivery of said promissory by R. C. Moffett.

The cause was tried before the court without a jury. Evidence was introduced by plaintiff showing the sale and delivery of the goods to Robert L. Moffett as Agent, Owner, as his records, that there was a balance due plaintiff therefor of $176.77, and that in extending the credit to Robert L. Moffett it relied upon said unidentified written promissory of R. C. Moffett. Thereupon plaintiff's attorney, in testing his case, after first in claiming the suit as to the defendant, Robert L. Moffett. Although the attorney representing both defendants stated that he had no objection to the granting of the motion, the court refused to grant it and suggested that he would permit plaintiff to take a nonsuit. Upon the request of plaintiff's attorney to adopt the suggestion the court [illegible] the issue against plaintiff, entered judgment on the finding, and plaintiff appealed.

Plaintiff's amended statement of claim alleged that the claim, upon which the petition must be based, was upon the written promissory of R. C. Moffett. In such an action [illegible] Moffett was a necessary party, and at any time before final judgment plaintiff was privileged to discontinue the action as to him and proceed against R. C. Moffett alone. (See, 30 Kansas Ann; Moyer v. Dreschimer, 180 Kan. 326, 328; Hanson v. Jacobs, 180 Kan. 640, 642; Kalbaugh Lumber Co. v. Irwin, 148 Kan. 647, 648.) The final court erred in not allowing the discontinuance of the action as to Robert L. Moffett and in entering the finding and judgment against plaintiff.

It is urged by plaintiff's counsel that this objection error should not be raised because plaintiff's proof showed R. C. Moffett for such balance of $176.77. We would not be justified in taking such action. With plaintiff's evidence we have. This

evidence, standing alone, would warrant such a judgment, but by reason of the action of the trial court the defendant, D. W. Steffey, had no opportunity of presenting evidence, if any he had, tending to show that Robert L. Steffey was not indebted to plaintiff in the amount claimed, or in any amount.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Morrill, J., concur.

138 - 27972

JOSEPH H. P. KLEIN, Appellant, vs. LOUIS C. JACOBSON, WILLIAM JACOBSON and CONRAD JACOBSON, copartners doing business as Lu-Will-Co. Printing Co., Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 25, 1921, plaintiff, as the purported assignee of a certain written lease, caused a judgment by confession in the sum of $270 to be entered against defendants, the lessees named therein. It was claimed that the monthly rent of $125 for the months of June and July, 1921, aggregating $250, was due plaintiff, and this sum, together with $20 attorneys' fees, made up the amount of the judgment. On February 9, 1922, on motion of defendants, the court opened the judgment, giving defendants leave to file an affidavit of merits, the judgment to stand as security. There was a hearing before the court without a jury, resulting in a finding against plaintiff and the setting aside on March 30, 1922, of the former judgment by confession and entering judgment against plaintiff for costs. This appeal followed. No printed brief and argument has been filed by appellees (defendants) in this appellate court.

On April 2, 1920, the Brand estate, owner of a four-story building on South Clark Street, Chicago, leased the entire building by written lease to D. D. Weiss Co., a corporation, and Louis Neumann, as lessees, for a term beginning May 1, 1920, and ending April 30, 1925, at a monthly

JOHN - JOHN

JOHN H. P. KLEIN,
Appellant,

vs.

LORIN C. JACKSON, [illegible]
JACKSON and CONRAD [illegible],
copartners doing business as
Im-Mill-Co. Printing Co.,
Appellees.

APPEAL FROM
SUPERIOR COURT
OF CHICAGO.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

On July 28, 1931, plaintiff, as the purported assignee of a certain written lease, caused a judgment by confession in the sum of $[illegible] to be entered against defendants, the lessees named therein. It was claimed that the monthly rent of $[illegible] for the months of June and July, 1931, aggregating $[illegible], was due plaintiff, and this sum, together with $[illegible] attorneys' fees, made up the amount of the judgment. On February 9, 1932, on motion of defendants, the court opened the judgment, giving defendants leave to file an affidavit of merits, the judgment to stand as security. There was a hearing before the court without a jury, resulting in a finding against plaintiff and the entering made on March 30, 1932, of the former judgment by confession and entering judgment against plaintiff for costs. This appeal followed. No printed brief and argument has been filed by appellees (defendants) in this appellate court.

On April 2, 1930, the Grand estate, owner of a four-story building on South [illegible] Street, Chicago, leased the entire building by written lease to P. L. Weber Co., a corporation, and Louis Bauman, as lessee, for a term beginning May 1, 1930, and ending April 30, 1932, at a monthly

rental exceeding $400. It was stipulated in the lease that the lessees had the privilege of sub-letting any part of the building, subject to the terms of the lease, which were the usual and customary ones. A copy of this lease is contained in the record. On the back of it appears an attempted assignment in writing, dated July 15, 1920, to one J. Frohlech, by the Weiss Co., per D. D. Weiss, its president, of that company's interest as one of the lessees in the lease. It does not appear that Neumann joined in the assignment or that the Brand estate consented in writing or otherwise. On September 25, 1920, the Weiss Co., by written lease, containing the usual provisions and including the power in the lessor or its assignees to confess judgment for rent due, sub-leased the entire third floor of the building and a part of the second floor to defendants for the period from October 15, 1920 to October 14, 1923 at the monthly rental of $125. Defendants took possession of those parts of the building, paid rent, and were in possession when the judgment by confession was entered against them. Subsequent to defendants taking possession, the Weiss Co. ceased doing business and vacated the building, and thereafter the Brand estate collected the accruing monthly rent from Neumann, one of the original lessees and the uncle of D. D. Weiss. Prior to said vacation by the Weiss Co., defendants paid their monthly rent to it, but afterwards to Neumann at his request and that of D. D. Weiss. On the back of the copy in the record of the sub-lease from the Weiss Co. to defendants appears an attempted written assignment, dated March 11, 1921, by the Weiss Co. to plaintiff, of said lease and of the interest of Weiss Co. therein and the rent secured thereby. It does not appear that either Neumann or the Brand estate consented in writing, or otherwise, to said assignment. On May 27, 1921, plaintiff gave written notice to

defendants of this assignment and that defendants' monthly rent should in the future be paid to him. After the receipt of the notice one of the defendants called upon Neumann and he stated that defendants should disregard the notice and pay their rent as it accrued to him, inasmuch as the Weiss Co. had no authority to make said assignment to plaintiff and as he (Neumann) was liable to the Brand estate for the rent of the entire building on the original lease and was paying rent each month to said estate. Defendants thereafter paid Neumann the rent for the months of June and July, 1921, for the portion of the building which they occupied, and plaintiff, on July 25, 1921, as the purported assignee of the sub-lease, caused the judgment by confession in question to be entered against defendants for the rent claimed to be due for those months.

Neumann's testimony was to the effect that, after the Weiss Co. had ceased doing business and had vacated the building, he personally paid the rent each month for the entire building to the Brand estate, as he was obligated to do as one of the lessees in the original lease; that he is in possession of the building; that said lease is in full force and effect; and that as such lessee he had never conveyed or assigned to plaintiff or anyone any interest which he had in defendants' sub-lease.

Under the facts disclosed, we are of the opinion that the trial court was fully warranted in setting aside the judgment by confession and in entering the judgment appealed from. We think that there was a lack of power or authority in the Weiss Co. to make the assignment of the sub-lease to plaintiff, it being against the rights of Neumann and the Brand estate, and that there was no basis for the judgment as confessed against defendants. And the fact that the application of defendants to set aside that judgment was not made until February 7, 1922, did not preclude defendants from appealing to the

defendants of this assignment and that defendants' monthly rent should in the future be paid to him. After the receipt of the notice one of the defendants called upon Bennett and he asserted that defendants should disregard the notice and pay their rent as it accrued to him, inasmuch as the notice to, had no authority to make said assignment to plaintiff and is no (Bennett) was liable to the Brand estate for the rent of the entire building on the original lease and was paying rent each month to said estate. Defendants thereafter paid Bennett the rent for the months of June and July, 1971, for the portions of the building which they occupied, and plaintiff, on July 8, 1971, sent the proprietors notices of the sub-lease, enclosed the original of said-Fowler in question to be entered against defendants for the rent claimed to be due for those months.

Bennett testimony was in the effect that, after the notice Co. had ceased doing business and had vacated the building, he personally paid the rent each month for the entire building to the Brand estate, as he was obligated to do by one of the leases in the original lease; that he is in possession of the building; that said lease is in full force and effect; and that no such lease he had never surrendered or assigned to plaintiff or anyone; any interest which he had in defendants' sub-lease.

Under the facts stated, we are of the opinion that the trial court was fully warranted in rating under the judgment by confession and in sustaining the judgment entered from. We think that there was a lack of power or authority in the Wiles Co. to make the assignment of the sub-lease to plaintiff, it being against the rights of Bennett and the Brand estate, and that there was no basis for the judgment by confession defendants. Nor the fact that the application of (illegible) made to set aside that judgment was not made until February 7, 1972, XXX did not preclude defendants from appealing to the

equitable jurisdiction of the court to obtain the necessary relief. (Knox v. Winsted Savings Bank, 57 Ill. 330; Lake v. Cook, 15 Ill. 353; Pearce v. Miller, 201 Ill. 188, 190.)

The judgment of the Municipal Court, entered on March 30, 1922, is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

equitable jurisdiction of the Court to provide the necessary relief." (Ibid. v. Standard Oil Company, 57 Cal.2d 592; Lobb v. Lobb, 57 Cal. 604; Estate of Sullivan, 141 Cal. App. 2d 1, 296.)

The judgment of the Superior Court, entered on March 26, 1969, is affirmed.

CONCURRING:

Stephen, J. J., and Kaufman, J., concur.

145 - 27980

LOUIS A. STINSON, Appellee, vs. THE PARK & POLLARD COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract, tried in the Municipal Court of Chicago without a jury, the court found the issues against defendant, assessed plaintiff's damages at the sum of $1695, and entered judgment against defendant in that amount. This appeal followed.

Plaintiff's claim is based upon defendant's check, dated December 17, 19[illegible], signed by its treasurer and countersigned by its secretary, drawn on a Chicago bank, and payable to plaintiff's order and delivered to him. It appears on the face of the check that payment was refused by the bank because of insufficient funds and that afterwards payment thereof was stopped by defendant. In plaintiff's statement of claim he alleged that $1600 and accrued interest was due him from defendant by reason of the delivery of said check "upon an account due plaintiff from the Harvey Milling Corporation and which at said time had been credited to said Harvey Milling Corporation." The defense, as disclosed from the affidavit of merits, was that there was no consideration for the check.

On the trial the following facts in substance were disclosed: The Harvey Milling Corporation (hereinafter referred to as the Harvey Co.) was organized for the purpose of manufac-

In a first class action in contract, tried in the Municipal Court of Chicago without a jury, the court found the issues against defendant, assessed plaintiff's damages at the sum of $1800, and entered judgment against defendant in that amount. This appeal follows.

Plaintiff's claim is based upon defendant's check, dated December 27, 1950, signed by its treasurer and countersigned by its secretary, drawn on a Chicago bank, and payable to plaintiff's order but delivered to him. It appears on the face of the check that payment was refused by the bank because of insufficient funds and that afterwards payment should not be stopped by defendant. In plaintiff's statement of claim he alleged that CLEO and Harvey Inherited was the first defendant by reason of the delivery of said check upon an account the plaintiff from the Harvey Milling Corporation and which at said time had been executed to said Harvey Milling Corporation." The defense, as disclosed from the stipulation of facts, was that there was no consideration for the check.

On the trial the following facts in substance were disclosed: The Harvey Milling Corporation (hereinafter referred to as the Harvey Co.) was organized for the purpose of manufac-

turing feed, etc. One Thomas Doe of Lowell, Mass., was the owner of an elevator located at Harvey, Illinois, which he turned over to the Harvey Co. at a certain valuation and he became the controlling stockholder therein. One David A. Badenoch, of Chicago, also a stockholder, was its president. Doe's interestsin the Harvey Co. were looked after by a man spoken of as Colonel Doe, who was in Chicago. The defendant corporation was engaged in the feed business, and Badenoch was also its president. The Harvey Co. had agreed with defendant to enlarge its plant at Harvey and manufacture feed for defendant. The two corporations occupied adjoining offices in Chicago. Defendant had agreed to subscribe for a considerable amount of the capital stock of the Harvey Co., part of which it had not yet paid for. About the middle of the year 1920 the Harvey Co. entered into a contract with plaintiff, who is a contractor, for the making of certain additions and improvements to its plant at Harvey, by which the Harvey Co. were to pay plaintiff for the labor and materials furnished by him, and also 5 per cent of the cost of such labor and materials as his compensation. Thereafter plaintiff proceeded with the work and furnished labor and materials to the Harvey Co., in an amount exceeding $45,000, and, except in one instance, his bills were always rendered to the Harvey Co. and the same were always checked over by Colonel Doe. Prior to November 12, 1920, all payments to plaintiff were made by the Harvey Co. On that date a payment was made by defendant's check to plaintiff, and thereafter and up to December 9, 1920, other payments were so made by defendant. Six checks, aggregating about $13,000, were given by defendant and cashed by plaintiff. The seventh check is the one in question.

According to the uncontradicted testimony, the giving of the six checks by defendant to plaintiff was the result of certain negotiations in each instance. After Colonel Doe had

checked over plaintiff's bill as rendered and found it correct, he, representing the Harvey Co., went to Badenoch, president of defendant, and asked him if defendant would give plaintiff a check for said bill, with the understanding that the amount would be credited on the books of the Harvey Co. as so much paid by defendant on the amount due the Harvey Co. on defendant's said subscription to its capital stock. If Badenoch agreed, the check was made out and delivered to plaintiff and the amount noted on defendant's books in its stock subscription account with the Harvey Co., and credited to it on the books of the Harvey Co. as a payment on such account, and the appropriate entry was made in the books of the Harvey Co., showing the payment of the amount to plaintiff on its account with him. None of these six payments so made to plaintiff was made without the knowledge and consent of Colonel Doe. There was no general agreement or understanding between defendant and the Harvey Co., or between Badenoch and Colonel Doe, that defendant or Badenoch would make payments to plaintiff when demanded, or that the same would be credited by the Harvey Co. as a payment on said stock subscription account. A separate agreement was made in each instance.

On Friday, December 17, 1920, plaintiff, wanting $1600 to meet a payroll, called on the secretary and treasurer of defendant and requested the check in question. These officers expressed themselves as being doubtful of their right to give such check without the usual negotiations and agreement between Badenoch and Colonel Doe, who were at the time both away from the city, but they finally decided to issue the check and deliver it to plaintiff, with the request that it be not presented at the bank on which it was drawn until the following Monday. As one of the signers of the check testified, he used his "best judgment" under the circumstances. The check was presented at the bank on Monday, December 20th, and payment was refused, for the reason that in

showed over plaintiff's bill on remedered and found it correct. Mr. Superintendent the Murray Co., sent to Indianapolis, president of defendant, and asked him if defendant would give plaintiff a check for said bill, with the understanding that the amount would be credited on the books of the Murray Co. as so much paid by defendant on the amount due the Murray Co. on defendant's said subscription to its capital stock. If Dadsworth agreed, the check was made out and delivered to plaintiff and the amount credited on defendant's books in its stock subscription account with the Murray Co., and credited to it on the books of the Murray Co. as a payment on such account, and the appropriate entry was made in the books of the Murray Co., showing the payment of the amount to plaintiff on its account with him. None of these six payments to make to plaintiff was made without the knowledge and consent of Colonel Doe. There was no general agreement or understanding between defendant and the Murray Co., or between Dadsworth and Colonel Doe, that defendant or Dadsworth would make payments to plaintiff when demanded, or that the same would be credited by the Murray Co. on a payment on such stock subscription account. A separate agreement was made in each instance.

On Friday, December 17, 1926, plaintiff, waiting 1600 to meet a payroll, called on the secretary and treasurer of defendant and requested the check in question. These officers expressed themselves as being doubtful of their right to give such check without the usual negotiations and agreement between Dadsworth and Colonel Doe, who were at the time both away from the city, but they finally decided to leave the check and deliver it to plaintiff, with the request that it be not presented at the bank on which it was drawn until the following Monday. In one of the aliquots of the check transfered, he used the "best judgment" under the circumstances. The check was presented at the bank on Monday, December 20th, and payment was refused, for the reason that in

the interim, as testified, "a creditor's committee stepped into the Park & Pollard business and all its checks were thrown out." Subsequently defendant stopped payment on the check.

It does not appear that at the time the check was given the Harvey Co. knew anything about the particular transaction, or that it was then understood that the Harvey Co. was to be credited pro tanto on its indebtedness to plaintiff, or that at any time thereafter the Harvey Co. credited the amount of the check on its books to defendant as a payment on the latter's stock subscription account, or that plaintiff on his books ever credited said amount to the Harvey Co. In April, 1921, plaintiff filed in the Circuit Court his verified bill against the Harvey Co. for a mechanics' lien upon its plant at Harvey, claiming a balance of over $37,000, due for labor performed and materials furnished, and in the itemized account of his claim no credit was allowed to the Harvey Co. for the amount of the check. Plaintiff testified on the trial: "This $1600 is included in the amount that the Harvey Milling Corporation now owes me. * * * I am still making that claim against the Harvey Milling Corporation, and I still maintain my right to enforce that claim against it and against its property." He commenced the present suit on the check on February 24, 1922.

Under the facts and circumstances we are of the opinion that there was no consideration for defendant's check. Plaintiff's contract for the labor and materials to be furnished at the Harvey plant was with the Harvey Co. alone. Defendant had no contract with him and was in no manner indebted to him. And we do not think that defendant can be held liable on the check on the ground that there was a novation, which is defined in 3 Bovier's Law Dictionary, p. 2375, as "the substitution of a new obligation for an old one, which is thereby extinguished." In Hayward v. Burke, 151 Ill. 121, 129, it is said: "In every novation there are four essential re-

the latter, on behalf, "a worker's complaint stopped into the work & helped workmen and all the one was thrown out," subsequently defendant stopped payment on the check.

It does not appear that at the time the check was given the Harvey Co. knew anything about the particular transaction, or that it was then understood that the Harvey Co. was to be credited for Tamm on its indebtedness to plaintiff, or that at any time thereafter the Harvey Co. credited the amount of the check on its books to defendant as a payment on the latter's stock subscription account, or that plaintiff on his books ever credited said amount to the Harvey Co. In April, 1921, plaintiff filed in the Circuit Court his verified bill against the Harvey Co. for a mechanics' lien upon the plant of Harvey, claiming a balance of over $17,000, due for labor performed and materials furnished, and in the itemized account of his claim on certain was claimed to the Harvey Co. for the amount of the check. Plaintiff testified on the trial: "Take $1000 is included in the amount that the Harvey MILLING Corporation owe me. * * * I am still making that claim against the Harvey MILLING Corporation, and I still maintain my right to enforce that claim against it and equitable its property." He commenced the present suit on the check on February 24, 1922.

Under the facts and circumstances we are of the opinion that there was no consideration for defendant's check. Plaintiff's contract for the labor and materials to be furnished at the Harvey plant was with the Harvey Co. alone. Defendant had no contract with him and was in no manner indebted to him. And we do not think that defendant can be held liable on the check on the ground that there was a novation, which is defined in 2 Bouvier's Law Dictionary, p. 2279, as "the substitution of a new obligation for an old one, which is thereby extinguished." In Brown v. Davis, 121 Ill. 243, 249, 12N, it is said: "In every novation there are four essential ele-

quisites: First, a previous valid obligation; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract; and fourth, the validity of the new one." In Karraker v. Middleman, 101 Ill. App. 23, 29, it is said, quoting from American and English Encyclopaedia of Law, (Vol. 16, pp. 862-7, 1st Ed.): "The original agreement of which novation is sought must be absolutely extinguished, and the new agreement substituted for it. The extinguishment of the original obligation constitutes the consideration for the new one. All the parties, not only to the new contract, but also to the one for which the new contract is substituted, must consent to the novation; the parties to the original contract must consent in order to have that extinguished, and the parties to the new contract in order to have a valid obligation substituted for the old." In 29 Cyc. 1132 it is said: "There can be no novation to which the original debtor does not consent, and to which he is not a party." In the present case it does not appear that the debt of the Harvey Co. to plaintiff, to the extent of $1600, was extinguished, or that plaintiff consented to such extinguishment, or that the Harvey Co. was a party to the new transaction when the check in question was given. Although it is true that "it is not essential that the assent to and acceptance of the terms of novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter," (29 Cyc. 1132), yet, under the facts and circumstances of this transaction and the conduct of the parties thereafter, particularly that of plaintiff, we do not think that any novation was agreed upon.

For the reasons indicated the judgment of the Municipal Court is reversed.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Merrill, J., concur.

quisites: First, a previous valid obligation; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract; and fourth, the validity of the new one." In Barnhart v. Gilleson, 105 Ill. App. 69, 72, it is said, citing from American and English Encyclopaedia of Law, (Vol. 14, pp. 688-7, 694 ff.): "The original contract of which novation is sought must be wholly extinguished, and the new contract substituted for it. The extinguishment of the original obligation constitutes the consideration for the new one. All the parties, not only to the new contract, but also to the one for which the new contract is substituted, must consent to the novation; the parties to the original contract must consent in order to have that extinguished, and the parties to the new contract in order to have a valid obligation substituted for the old." In 39 Cyc. 1181 it is said: "There can be no novation to which the original debtor does not consent, and to which he is not a party." In the present case it does not appear that the debtor of the Surety Co. to plaintiff, in the amount of $1000, was extinguished, or that plaintiff consented to such substitutement, or that the Surety Co. was a party to the new transaction when the check in question was given. Although it is true that "it is nonessential that the assent to and acceptance of the terms of novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereto," (39 Cyc. 1181), yet, under the facts and circumstances of this transaction and the conduct of the parties thereto, particularly that of plaintiff, we do not think that any novation was effected.

For the reasons indicated the judgment of the municipal court is reversed.

Reversed.

Burke, P. J., and Barrett, J., concur.

145 - 27980

FINDING OF FACTS.

We find as ultimate facts in this case that defendant's check sued upon is without consideration to support it, and that defendant is not indebted to plaintiff in any sum.

157 - 27992

ANNA HOJNACKI,
Appellee,

vs.

SAMUEL E. MOIST,
Appellant.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in trespass, commenced July 10, 1920, for damages for alleged injuries to her person, occasioned by an alleged assault and battery, plaintiff, on July 1, 1922, recovered a judgment against defendant in the sum of $5,000, and he appealed.

The gist of both counts of plaintiff's declaration is that on September 13, 1918, the defendant, trading under the name of the Union Piano Company of Chicago, by his servants, agents and employees while acting in the course of their employment, wantonly assaulted her at her home, and violently seized, choked and kicked her, whereby she was seriously injured. In addition to the plea of the general issue the defendant filed two special pleas. In one defendant stated that the persons guilty of the alleged wrongs, if any, were not the servants or agents of defendant, and that defendant did not have any control over them and did not direct them in the moving or repossessing of a certain piano from plaintiff's home. In the other defendant set forth a certain written contract between the parties, dated January 16, 1917, whereby the title to the piano remained in defendant until the full purchase price thereof had been paid and whereby defendant was given the right to enter plaintiff's

ANNA HOLTMANN,

Appellee,

vs.

SAMUEL K. MOTSU,

Appellant.

APPEAL FROM
CONCILIATION COURT OF
COOK COUNTY.

Mr. Justice MCGURE delivered the opinion of the court.

22 - 2 - 630

In an action in trover, commenced July 30, 1930, for damages for alleged injuries to her person, commenced by an alleged assault and battery, plaintiff, on July 1, 1932, recovered a judgment against defendant in the sum of $2,000, and he appealed.

The gist of both counts of plaintiff's declaration is that on September 12, 1929, the defendant, trading under the name of the Union Plane Company of Chicago, by his servants, agents and employees while acting in the course of their employment, wrongfully assaulted her at her home, and violently seized, choked and kicked her, whereby she was seriously injured. In addition to the plea of the general issue the defendant filed two special pleas. In one defendants stated that the personal guilty of the alleged wrongs, if any, were not the servants or agents of defendants, and that defendants did not have any control over them and did not direct them in the making or transmitting of a certain plane from plaintiff's home. In the other defendants set forth a certain written contract between the parties, dated January 12, 1929, whereby the title to the plane remained in defendant until the full purchase price thereof had been paid and whereby defendant was given the right to enter plaintiff's

home and repossess the piano in case of the non-payment of certain stipulated monthly payments, and alleged that on September 13, 1918, a certain balance was due him on said contract, and further alleged that the persons who took the piano were not defendant's employees but the servants and employees of an independent contractor over whom defendant had no control and to whom he gave no orders or directions. To these special pleas plaintiff filed replications. There was a trial before a jury. At the close of plaintiff's evidence and again at the close of all the evidence defendant moved for a directed verdict in his favor but the motions were overruled. The jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of $5,000.

There was a sharp conflict in the evidence on the question whether on the day mentioned the persons, who entered plaintiff's home with her consent and who took the piano away, committed any assault upon her, or injured her person in any manner. And plaintiff's evidence failed to show, as charged, that said persons were the servants, agents or employees of defendant. On the contrary defendant's uncontradicted evidence disclosed in substance that said persons were the servants or employees of Albert Weise & Co., an independent contractor, engaged in Chicago for many years in hauling pianos for various piano dealers including defendant; that defendant had a contract with Weise & Co. at the time for the moving of all of his pianos, settlements for such work to be made monthly; that the manager of defendant's business, in writing and on a printed blank furnished by Weise & Co., ordered Weise & Co. to move said piano from plaintiff's home to defendant's place of business and that no further orders or directions were given by defendant to anyone; that in compliance with said order Weise & Co. directed said

home and repossess the piano in case of the non-payment of certain stipulated monthly payments, and alleged that on September 15, 1910, a certain balance was due him on said contract, and further alleged that the persons who took the piano were not defendant's employees but the servants and employees of an independent auctioneer over whom defendant had no control and to whom he gave no orders or directions. The three co-defendants pleaded joint trespassers. There was a trial before a jury. At the close of plaintiff's evidence and again at the close of all the evidence defendant moved for a directed verdict in his favor but the motions were overruled. The jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of $[illegible].

There was a sharp conflict in the evidence as to the question whether on the day complained the persons, who entered plaintiff's home with her consent and who took the piano away, committed any assault upon her, or injured her person in any manner. And plaintiff's evidence tended to show, as claimed, that said persons were his servants, agents or employees of defendant. On the contrary defendant's uncontradicted evidence tended to substantiate that said persons were the servants or employees of Harry Dale & Co., an independent auctioneer, who had in charge for many years in selling pianos for various piano houses including defendant; that defendant had a contract with Dale & Co. at the time for the sending of all of his pianos, sufficients for such Dale to be made delivery; that the manager of defendant's business, in writing and in a private talk, claimed by Dale & Co., entered into a [illegible] from plaintiff's home to defendant's place of business and that no further orders or directions were given by defendant to anyone; that in consultation with Harry Dale & Co. defendant told

persons, its employees, to call at plaintiff's home, get the piano and deliver it to defendant, which they did, using a truck owned by Weise & Co. for that purpose; that said persons were paid solely by Weise & Co.; that the right to discharge them from service rested solely with Weise & Co.; and that defendant was without right or authority to instruct them or give them any orders relative to the work or as to the methods used in moving the piano, and in fact gave them no such instructions or orders.

In view of these facts we are of the opinion that the trial court erred in overruling defendant's motions for a directed verdict in his favor, and in entering the judgment appealed from. The persons who moved the piano, and who were charged with having committed the assault and battery, were not, as alleged, the servants, agents or employees of defendant, were not paid by him, or subject to his control, and could not be discharged by him for any disobedience of orders or for any misconduct. On the contrary they were the servants or employees of, and under the exclusive control of, Weise & Co. Under such circumstances we do not think that defendant should be held liable for the personal injuries, if any, suffered by plaintiff at their hands. (Hale v. Johnson, 80 Ill. 185, 186; Foster v. Wadsworth-Howland Co., 168 Ill. 514, 519; Pioneer Fireproof Construction Co. v. Hansen, 176 Ill. 100, 108; Connolly v. People's Gas Light Co., 260 Ill. 162, 166.) In the Connolly case it is said: "A servant who is sent to do work which his master has agreed to perform does not become the servant of the one for whom the work is performed by having the work pointed out to him. He is the master who has the choice, control and direction of the servant, and it was held in Pioneer Fireproof Construction Co. v. Hansen, 176 Ill. 100, that the right to control involves the power to discharge, and that the relation of master and servant will not exist unless the power to discharge exists." In

persons, its employees, to call at plaintiff's home, get the piano and deliver it to defendant, which they did, using a truck owned by Weiss & Co. For that purpose; that said persons were paid solely by Weiss & Co.; that the right to discharge them from service rested solely with Weiss & Co.; and that defendant was without right or authority to instruct them or give them any orders relative to the work or as to the methods used in moving the piano, and in fact gave them no such instructions or orders.

In view of these facts we are of the opinion that the trial court erred in overruling defendant's motions for a directed verdict in his favor, and in entering the judgment appealed from. The persons who moved the piano, and who were charged with having committed the assault and battery, were not, as alleged, the servants, agents or employees of defendant, were not paid by him, or subject to his control, and could not be discharged by him for any disobedience of orders or for any misconduct. On the contrary they were the servants or employees of, and under the exclusive control of, Weiss & Co. Under such circumstances we do not think that defendant should be held liable for the personal injuries, if any, suffered by plaintiff at their hands. State v. Dalton, 28 Ill. 305, 310; Fowler v. Commercial-Telegraph Co., 146 Ill. 314, 318; Pioneer Fireproof Construction Co. v. Hanson, 178 Ill. 339, 346; Connolly v. Pullman's Palace Car Co., 158 Ill. 244, 247; In the Connolly case it is said: "A servant who is made to do work which his master has agreed to perform does not become the servant of the one for whom the work is performed by having the work pointed out to him. He is the master who has the choice, control and direction of the servant, and it was held in Pioneer Fireproof Construction Co. v. Hanson, 178 Ill. 339, that the right to control involves the power to discharge, and that the relation of master and servant will not exist unless the power to discharge exists." In

La May v. Industrial Commission, 292 Ill. 76, 79, it is said: "An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished." In Bristol & Gale Co. v. Industrial Commission, 292 Ill. 16, 22, it is said: "The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor."

The judgment of the Superior Court should be reversed and it is so ordered.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Morrill, J., concur.

In [illegible] v. Industrial Commission, 309 Ill. 71, 75, it is said: the independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished." In [illegible] v. Industrial Commission, 326 Ill. 16, 20, it is said: "The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or an independent contractor."

The judgment of the Superior Court should be reversed and it is so ordered.

REVERSED WITH FINDING OF FACT.

Barnes, P. J., and Scanlan, J., concur.

157 - 27992

FINDING OF FACTS.

We find as ultimate facts in this case that the defendant, Samuel H. Moist, did not, by his servants, agents or employees, commit the assault and battery upon plaintiff as alleged; and that if plaintiff suffered any personal injuries by reason of the alleged assault and battery on the day in question such injuries were the result of the actions of the servants or employees of Albert Weise & Co., an independent contractor, for which said defendant is not liable.

347 - 1921.

DAMAGE OF BROKE.

We find as ultimate facts in this case that the defendant, Daniel S. Wolf, did not, by his servants, agents or employees, remove the cement and battery upon plaintiff's alleged; and that if plaintiff suffered any personal injuries by reason of the alleged cement and battery on the day in question such injuries were the result of the actions of the servants or employees of Albert Weiss & Co., an independent contractor, for which said defendant is not liable.

201 - 28036

NETT W. HOBBLES, Appellee, vs. AMERICAN POSTING SERVICE, a Corporation, and THOMAS GUSACK COMPANY, a Corporation, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a forcible detainer action, commenced in the Municipal Court of Chicago on July 19, 1932, a judgment, following a finding, was entered on August 8, 1932, in favor of plaintiff for the possession of certain premises. Defendants appealed.

On the hearing it appeared from the uncontradicted testimony of plaintiff's agent that some years ago the premises had been leased for signboard purposes to defendants' predecessor by verbal lease from year to year; that this lease had been continued from year to year from July 1st to July 1st, at $50 per year; that defendants had for several years past paid this yearly rental to plaintiff; and that on February 27, 1932, she served a written notice upon both defendants notifying them that their tenancy of the premises would be terminated on July 1, 1932, and that they should remove their bill-boards and vacate the premises and surrender possession thereof to her on said date. Defendants did not vacate in compliance with the notice and were in possession of the premises when the action was commenced.

Defendants did not introduce any evidence. Their only point made at the trial was that the notice was not served at the proper time. The same point is urged here. It has no merit. It is provided in Section 5 of the Landlord and Tenant Act: "In all cases

of tenancy from year to year, sixty days' notice in writing shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year." In the present case defendants' tenancy was from year to year, and the end of the year was on July 1st. The notice was served on February 27th, and this was at a time within the four months preceding the last sixty days of the year. The provisions of the statute were complied with. (Pangborn v. Blakely, 217 Ill. App. 67).

Defendants also contend that plaintiff did not prove any lease between her and defendants, or any privity of interest between her and defendants. The defendants recognized her as their landlord and for several years paid her the yearly rent, and they are estopped from denying her title, or her right to possession under the circumstances. (Jinkinson v. Owens, 180 Ill. App. 122). Furthermore, defendants not having raised the point in the trial court cannot properly raise it in this appellate court for the first time. (O'Connor v. Maryland Motor Ins. Co., 287 Ill. 204, 211.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

of tenancy from year to year, sixty days' notice in writing shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year." In the present case defendants' tenancy was from year to year, and the end of the year was on July 1st. The notice was served on February 27th, and this was at a time within the four months preceding the last sixty days of the year. The provisions of the statute were complied with. (Dunkerson v. Kimball, 119 Ill. App. 87).

Defendants also contend that plaintiff did not prove any lease between him and defendants, or any privity of interest between her and defendants. The defendants recognized her as their landlord and for several years paid her the yearly rent, and they are estopped from denying her title, or her right to possession under her circumstances. (Hibbinson v. Greene, 180 Ill. App. 120). Furthermore, defendants not having raised the point in the trial court cannot properly raise it in this appellate court for the first time. (Kimball v. Lawrence Sugar Co., 88 Ill. App. 117, 119, 121.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barrett, P. J., and Burrill, J., concur.

219 - 28054

IN THE MATTER OF THE ESTATE OF SAMUEL L. WINTERNITZ, deceased,	
--o-o-o-o--	APPEAL FROM
CHICAGO DIGGER AND MANUFACTURING COMPANY, a corporation, Claimant and Appellant,	CIRCUIT COURT OF COOK COUNTY.
vs.	
ESTATE OF SAMUEL L. WINTERNITZ, deceased, Appellee.	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, entered May 21, 192[illegible], dismissing appellant's claim for want of jurisdiction to pass upon it.

On March 21, 1918, the claimant filed in the Probate Court of Cook County its written claim as follows:

> "To net profits upon 100,000 Earth Augers made and sold by the deceased by illegally and wrongfully using and infringing U. S. Patent No. 793,185, the property of the Chicago Digger and Manufacturing Company, being $1.50 net profit on each auger sold from November 1, 1913 to February 23, 1917 ---- $150,000."

Accompanying the claim is the affidavit of the secretary and treasurer of the claimant in which he alleged in substance that the annexed claim against said estate is just and unpaid; that the claimant is the owner of U. S. Patent No. 793,185, for earth augers, which was leased to one Frank Chase on a royalty basis; that Chase manufactured and sold the patented auger for about three years under the name and style of the Standard Earth Auger Company; that about June, 1913, said company went into bankruptcy and subsequently said Samuel L. Winternitz, now deceased, acquired the assets thereof, formed a new corporation, known as the Standard Auger Company and of which he was the owner of all the stock, and thereafter operated

IN THE MATTER OF THE ESTATE
OF SAMUEL L. WISTERWITZ, deceased.

CHICAGO BREWING AND MANUFACTURING
COMPANY, a corporation,
Claimant and appellant,

vs.

ESTATE OF SAMUEL L. WISTERWITZ,
deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, entered May 21, 1917, disallowing appellant's claim for want of jurisdiction to pass upon it.

On March 22, 1916, the claimant filed in the Probate Court of Cook County its written claim as follows:

"To net profits upon 100,000 barrels lager beer and malt by the decedent by illegally and wrongfully making and injuring U. S. Revenue No. 2783,388, the property of the Chicago Lager and Malt Brewing Company, being $3.00 net profit on each barrel with five November 1, 1913 to February 16, 1917 - $300,000."

Accompanying the claim is the affidavit of the secretary and treasurer of the claimant in which he alleges in substance that the annexed claim against said estate is just and unpaid; that the claimant is the owner of U. S. Revenue No. 2783,388, for which reason, which was issued to one Frank Crane on a royalty basis; that Crane manufactured and sold the patented malt for that year under the name and style of the Standard Malt Lager Company; that about June, 1913, said company went into bankruptcy and subsequently said Samuel L. Wisterwitz, now deceased, acquired the assets thereof, formed a new corporation, known as the Standard Lager Company and of which he was the owner of all the stock, and thereafter manufactured

the same; and that from about November 1, 1913, until his death, said Winternitz, by and through said new company, manufactured, advertised and sold the said auger, covered by said patent, without right, license or authority, thereby "infringing upon the rights" of said claimant. Affiant further alleged, upon information and belief, that said Winternitz, through said company and from November 1, 1913, until February 23, 1917, manufactured and sold 100,000 augers, on each of which there was a net profit of $1.50, and that "by reason of said infringement" made profits out of the use of said patent in the sum of $150,000, which in justice and equity belong to and are owing by his estate to said claimant.

It appears from the transcript that on June 8, 1921, there was a hearing on said claim in the Probate Court, at which evidence was introduced and arguments had, resulting in the court dismissing the claim without prejudice. From this order the claimant prayed and perfected an appeal to the Circuit Court, where on May 31, 1922, the case was called for hearing de novo. It further appears from the court's order contained in the transcript that on that day, after the claimant had demanded a jury, the attorney for said estate moved to dismiss the claim because of lack of jurisdiction in the court to pass upon it, and that, after hearing arguments of counsel but without hearing any evidence, the court sustained the motion and dismissed the claim. This appeal followed.

Although no written pleadings are required for the hearing of claims against the estates of deceased persons in the probate courts of this State, and it is not necessary that such claims should be presented in technical legal form or precision, and the court may look to the substantial rights of the parties, yet, as said in Carter v. Pierce, 114 Ill. App. 589, 592, "it is nevertheless essential that a claim, however

informal, should so specify and identify the transaction out of which it arose as to apprise all concerned of its general nature and character, and the amount claimed, so that it can be properly investigated and defended against if desired. The mere filing of a statement of claim in writing to the effect that the deceased is indebted to the claimant, without stating upon what the claim is based, would not be such an exhibition of the same as is contemplated by statute. The statement, in a claim, of the cause of action, is therefore material and essential, and goes to the substance of the claim." It clearly appears, we think, from an examination of the claimant's written claim, and the affidavit in support thereof, that the claimant seeks damages from the estate by reason of the alleged infringement by the deceased during his lifetime of the claimant's alleged patent for earth augers. The main issue is the alleged infringement. It is well settled by the decisions that of such controversies the Federal courts have exclusive jurisdiction. In Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 137, it is said: "It will not be disputed that, in all cases brought to recover damages for the infringement of patents, or to restain such infringements, the jurisdiction of the Federal courts is exclusive. See sections 627, 711 and 4921 of the Revised Statutes of the United States." In Forster v. Brown Hoisting Machinery Co., 266 Ill. 287, 296, it is said: "The Supreme Court of the United States said in Excelsior Wood Pipe Co. v. Pacific Bridge Co., 185 U. S. 282: 'There is a complete distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading, - be it bill, complaint or declaration, - sets up a right under the patent laws as ground for a recovery. Of such the State courts have no jurisdiction.' Appellant sets up a right based upon a patent issued to Brown, and the determination of that claim

informal, should be specify and identify the transaction out of which it arose so to apprise all concerned of its general nature and character, and the amount claimed, so that it can be properly investigated and defended against if desired. The mere filing of a statement of claim in writing to the effect that the deceased is indebted to the claimant, without stating upon what claim is based, would not be such an admission of the same as is contemplated by statute. The statement, in a claim, of the cause of action, is therefore material and essential, and goes to the substance of the claim." It clearly appears, we think, from an examination of the claimant's written claim, and the affidavit in support thereof, that the claimant seeks damages from the estate by reason of the alleged infringement by the deceased during his lifetime of the claimant's alleged patent for earth augers. The main issue is the alleged infringement. It is well settled by the decisions that of such controversies the Federal courts have exclusive jurisdiction. In Bowman Brass Mfg. Co. v. Lamprey, 146 Ill. 518, 527, it is said: "It will not be disputed that, in all cases brought to recover damages for the infringement of patents, or to restrain such infringements, the jurisdiction of the Federal courts is exclusive. See sections 629, 711 and 4921 of the Revised Statutes of the United States." In Portable v. Brown Hoisting Machinery Co., 206 Ill. 327, 330, it is said: "The Supreme Court of the United States said in Excelsior Wood Type Co. v. Hamilton Brass Co., 183 U. S. 228: 'There is a complete distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading, - be it bill, complaint or declaration, - sets up a right under the patent laws as ground for a recovery. Or when the state courts have no jurisdiction.' Appellant sets up a right based upon a patent issued to Brown, and the determination of that claim

cannot be made without deciding upon the validity of Brown's patent. We can come to no other conclusion than that this is a case under the patent laws and that State courts have no jurisdiction." In the present case, not only is the validity of the claimant's patent an issue to be determined but also whether Winternitz in his lifetime was guilty of the infringement as claimed. If it be contended that the Circuit Court erred in dismissing the claim for want of jurisdiction without first having heard evidence showing what the claim was, it is a sufficient answer to say that the claim as filed discloses on its face that the claimant sought to recover damages for the alleged infringement of the patent, - a matter which neither the Probate nor the Circuit Court of Cook County had jurisdiction to pass upon. Furthermore, it appears from the Circuit Court's order that at the hearing arguments of counsel were had. In the absence of a bill of exceptions it must be presumed that during that argument the court was advised of such facts which, without the testimony of sworn witnesses, sufficiently warranted the court in dismissing on motion the claim for want of jurisdiction to pass upon it. (14 Cyc. 435; City of Windsor v. Cleveland, Cincinnati, Chicago & St. L. Ry. Co., 105 Ill. App. 46, 48.)

For the reasons indicated the judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

cannot be made without precluding upon the validity of plaintiff's patent. We can find no other consideration that ought to be made under the proper facts and that other courts have in jurisdiction. In the present case, not only is the validity of the plaintiff's patent an issue to be determined but also another issue is the infringement quality of the indictment made in claims. It is necessary that the District Court should in dismissing the claim for want of jurisdiction without having more evidence showing that the claim was, in fact a sufficient answer to say that the claim is filed dependent on the fact that the plaintiff is trying to recover damages for the alleged infringement of the patent, - a matter which neither the statute nor the Circuit Court of Appeals confer jurisdiction to pass upon. Furthermore, it appears from the District Court's order that at the hearing objection of counsel was had, in the absence of a bill of exceptions it must be presumed that further that evidence had been offered of such facts which affirmed the testimony of some witnesses, sufficiently warranted the court in dismissing on motion the claim for want of jurisdiction be gave upon it. 111 Fed. 609; Ilin of Chicago v. Illinois Electrical Signaling Co. N. Y. Co., 200 Fed. 1, 4, 4.)

For the reasons indicated the judgment of the Circuit Court is affirmed.

ATTACHED.

Barnes, J. J., and Sheffit, J., dissent.

229 - 38064

ATLAS ELECTROTYPE COMPANY, a corporation, Appellant,	APPEAL FROM
vs.	SUPERIOR COURT OF
W. F. HALL PRINTING COMPANY, a corporation, Appellee.	COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced August 5, 1920, the jury, after hearing evidence introduced by both parties, returned a verdict finding the issues for defendant, and the court, on February 4, 1922, entered judgment on the verdict against plaintiff for costs. This appeal followed.

By written lease defendant leased to plaintiff from May 1, 1909 to April 30, 1918, at a stipulated monthly rental, a portion of the 6th floor of a manufacturing building owned by defendant in Chicago. It was provided in the lease that the party of the first part (defendant) agreed to furnish to the party of the second part (plaintiff) "Edison electric power, or other electric power sufficient for the use of the party of the second part, and to charge the party of the second part therefor at the same rate and price, subject to the same discounts, as the party of the first part pays for the same." On April 30, 1912, defendant executed an additional written lease to plaintiff for the remaining portion of said 6th floor for a term expiring on the same date. In this additional lease there was the identical provision relative to electric power. On June 26, 1913, defendant gave plaintiff a written option to renew both leases for a period of ten years from May 1, 1918, and plaintiff occupied said 6th floor until about

June 12, 1919, when by agreement it vacated the premises. During each month from May, 1909 to June, 1912, defendant sent bills to plaintiff for electric power at the flat rate of 4-1/2 cents per kilowatt-hour, and during each month from June, 1912, to July, 1919, at the flat rate of 3-1/2 cents per kilowatt-hour. These bills as rendered were all paid by plaintiff to defendant.

Plaintiff brought the action to recover for the alleged over-charge for the electric power during the entire period while plaintiff was a tenant in the building, which power was furnished defendant by the Commonwealth Edison Company. Plaintiff claimed on the trial that from May, 1909, to June, 1919, inclusive, the aggregate sum of its over-payments to defendant was more than $8,500.

Plaintiff's declaration consisted of three special counts and the common counts. The substance of the charges in the special counts was that defendant did not regard its said agreement, as stipulated in the leases, to furnish electric power to plaintiff at the rate and price that it paid for the same, but charged plaintiff sums greatly in excess thereof, which sums plaintiff paid, not knowing of the over-charge; that it falsely concealed from plaintiff the exact sums paid, and made false statements and bills, well knowing the same to be false; and that plaintiff relied upon the correctness of the bills and statements.

Defendant filed a plea of the general issue and of the statute of limitations for five years, and two special pleas. In these special pleas defendant alleged in substance that on or about June 2, 1909, it entered into a new agreement with plaintiff regarding the price the latter was to pay for the electric power, wherein plaintiff agreed to pay a flat rate of 4-1/2 cents per kilowatt-hour for such power; that there-

after and until July 31, 1912, plaintiff each month voluntarily made, and defendant accepted, payments for such power at such rate; that on or about July 31, 1912, defendant entered into a second agreement with plaintiff, wherein said flat rate was fixed at 3-1/2 cents per kilowatt-hour; and that plaintiff thereafter continued to make monthly payments to defendant for such power at such new flat rate until it vacated the premises in the year 1919.

The following further facts in substance were disclosed from the evidence: The rate which was in effect during the period in question is known as the demand rate, which consists of two parts, one of which is based upon the largest amount, i.e., the maximum demand made for electricity during a particular month, which is charged for at a certain rate per kilowatt of demand. The other part is known as the energy factor and is based upon the quantity of electricity used, measured in kilowatt-hours. Use of electricity for light or power is generally intermittent. The requirements for light are greater on some days than on others. And so it is as to electric power. Electric motors are used more heavily on some days than on others or during certain hours of the day. As a result there is a time when there is a maximum number of lights burning and a maximum number of motors running; in other words, when the load is at its peak and there is the maximum demand. These two factors of the rate-maximum demand and quantity of electricity used - are usually measured by meters. The maximum demand as measured is used as the basis for the demand charge in the rate, and this demand, as well as the quantity used by the consumer, must be known in order to determine what he is to pay for the service. In the present case, the bills sent each month to defendant by the Edison Co. itemized the charges, measured in kilowatts and kilowatt-hours as determined by the readings of the meters installed in defendant's plant. These charges included the

after and until July 31, 1912, plaintiff each month voluntarily made, and defendant accepted, payments for such power at such rate; that on or about July 31, 1912, defendant entered into a second agreement with plaintiff, wherein said Item and Item at 3-1/2 cents per kilowatt-hour; and that plaintiff thereafter continued to make monthly payments to defendant for such power at such new Item rate until it vacated the premises in the year 1916.

The following further facts in evidence were elicited from the witnesses: The rate which was in effect during the period in question is known as the demand rate, which consists of two parts, one of which is based upon the largest amount, i.e., the maximum demand made for electricity during a particular month, which is charged for at a certain rate per kilowatt or hour. The other part is known as the energy factor and is based upon the quantity of electricity used, measured in kilowatt-hours. The cost of electricity for lights or power is generally determinable. The equipments for light are greater on some days than on others, and so it is as to electric power. Electric motors are used more heavily on some days than on others or during certain hours of the day. As a result there is a time when there is a maximum number of lights burning and a maximum number of motors running; in other words, when the load is at its peak and there is the maximum demand. These two factors of the rate-maximum demand and quantity of electricity used - are usually measured by meters. The maximum demand as measured is used as the basis for the demand charge in the rate, and this demand, as well as the quantity used by the consumer, must be known in order to determine what he is to pay for the service. In the present case, the Ville used each month to determine by the meters the "kilowatts and the charges" measured in kilowatts and kilowatt-hours as determined by the readings of the

electricity used by plaintiff, and a meter was installed on plaintiff's premises by the Edison Co., reading in kilowatt-hours, to measure the quantity of electricity consumed by plaintiff, after the current had passed through defendant's meters. At the commencement of plaintiff's tenancy and for a short time a second meter was installed on plaintiff's premises, to measure the maximum demand of plaintiff, but this meter was not used and was thereafter removed by the Edison Co. Hence, as to the electricity used by plaintiff, only one of the two factors, which entered into the total charge made by the Edison Co., could accurately be known, viz: the quantity consumed as measured in kilowatt-hours. At the end of May, 1909, the first month of plaintiff's tenancy, defendant received a bill from the Edison Co., which showed the total quantity of electricity consumed and the maximum demand required by defendant, including that of plaintiff, and also the quantity of electricity used solely by plaintiff, but which did not disclose plaintiff's maximum demand. And subsequently from month to month thereafter defendant received similar bills. Defendant was unable to determine what was the total cost to it for the electricity which it was furnishing through the Edison Co. to plaintiff, and was obliged to estimate that cost, and after investigation following the receipt of the first month's bill concluded that a flat rate of 4-1/2 cents per kilowatt-hour was approximately correct, and accordingly rendered plaintiff such a bill. After the receipt of this bill, and several other monthly bills at the same rate, plaintiff's president, Rush, called on defendant's president, Eastman, and objected to the rate as charged, stating that he <u>thought</u> it too large and not in accordance with the provision contained in the lease. Eastman, in reply, stated that because of the above mentioned facts the actual cost of the electricity which plaintiff was using could not be accurately determined, that a rate of 4-1/2 cents per kilowatt-hour was <u>about</u> the cost to defendant, and that

electricity used by plaintiff, and a meter was installed on plaintiff's premises by the Edison Co., reading in kilowatt-hours, to measure the quantity of electricity consumed by plaintiff, after the current had passed through plaintiff's meter. At the commencement of plaintiff's tenancy and for a short time a second meter was installed on plaintiff's premises, to measure the maximum demand of plaintiff, but this meter was not used and was always removed by the Edison Co. Hence, as to the electricity used by plaintiff, only one of the two factors, which entered into the total charge made by the Edison Co., could accurately be known, viz: the quantity consumed as measured in kilowatt-hours. At the end of July, 1914, the first month of plaintiff's tenancy, defendant received a bill from the Edison Co., which stated the total quantity of electricity consumed, the maximum demand required by defendant, including that of plaintiff, and also the quantity of electricity used solely by plaintiff, but which did not disclose plaintiff's maximum demand. And subsequently from month to month thereafter defendant received similar bills. Defendant was unable to determine what was the total cost to it for the electricity which it was furnishing through the Edison Co. to plaintiff, and was obliged to estimate this cost, and after investigation defendant the receipt of the first month's bill concluded that a flat rate of 4-1/2 cents per kilowatt-hour was approximately correct, and accordingly rendered plaintiff such a bill. After the receipt of this bill, and several other monthly bills at the same rate, plaintiff's president, Mr. Pollock as defendant's president, further and objected to the rate as charged, stating that he thought it too large and not in accordance with the previous contract in the lease. Thereon, in fact, under that contract of the first month, based upon the total cost of the electricity using plaintiff's meter, which had to accurately determined, that a rate of 4-1/2

the plaintiff ought to be satisfied. Bush said "all right," and thereafter plaintiff paid defendant's bills as rendered at said flat rate. Shortly thereafter plaintiff made inquiries of the Edison Co., concerning the cost to defendant for the electricity used by plaintiff, but was unable to obtain the desired information, and, until about the middle of the year 1912, made no further investigations, but continued to pay defendant's monthly bills as rendered. Bush testified: "In my experience as a consumer of electricity, I knew that the bills from month to month would vary a trifle due to the different character of electricity I would use, with reference to the energy consumption and the maximum demand. After they had furnished me their first bills I spoke to Eastman about it. I simply complained about the bills being excessive. * * I had an idea they were buying it cheaper. * * I had no solid facts for this. * * I was unable to get information from the Edison people. * * After 1909, I made no further effort to find out what A. F. Hall Company was paying for electricity to the Edison Company; after 1909, we just received the bills and sent our check." Some time in June, 1912, Bush again spoke to Eastman, saying in substance that he still felt that plaintiff was paying too much for the electricity used by it, and that there ought to be a reduction on the flat rate. Eastman said he would look into the matter further, and, after he had consulted with defendant's auditor, Charles Oliff, stated to Bush, in Oliff's presence, that after considerable investigation defendant had reached the conclusion that, as near as it could be arrived at, 3-1/2 cents per kilowatt-hour would then represent about the cost to defendant of the electricity which plaintiff was using, and further said that, if satisfactory, the monthly bills in the future would be rendered to plaintiff at that flat rate. Bush replied "That's fine; that's satisfactory." Thereafter, from July, 1912, to July, 1913, defend-

the plaintiff began to be satisfied. Work was "full ahead," and Underwater Plaintiff and Johnson, Hill, an engineer at Wild Flat mine. Shortly thereafter plaintiff made inquiries of the Edison Co., concerning the cost to telephone for the electricity need by plaintiff, but was unable to obtain the desired information. And, until about the middle of the year 1912, made no further investigations, but continued to pay defendant's monthly bills as rendered. Then testified: "In my experience as a consumer of electricity, I have found the bills from meets to meets only a little due to the different characteristics of electricity I would use, with reference to the energy consumption and the maximum demand. After this had continued on about five years I spoke to Foreman about it. I simply complained that the bills being expensive. I had an idea they were higher in charge. I had no right from the time. I was unable to get information from the Edison people. I after that, I made an internal effort to find out about it. Well demand was higher for electricity in the Edison Company, after 1909, so that reduced the bills and made them cheaper. Some time in June, 1911, Hill again spoke to foreman, saying he wanted him to be in the mine. Foreman said he would look into the matter for me, and, after he had consulted with superintendent, Charles Hill, United in Duck, in Hill's presence, that after consulting the Edison information had received the Edison, so that it would be cheaper. Hill said that plaintiff would have nothing more to do with electricity, he said, and further said that, if written notice, the monthly bills in the future would be rendered in January of each year. Then testified Court's Plan, Hill's notice every? Thereafter, from June, 1911, to July, 1912, defendant

ant rendered monthly bills to plaintiff at said new flat rate and the same were all paid by plaintiff, - it making no further objection to the charges until about a year after plaintiff had vacated the premises and shortly before the present action was commenced.

Counsel for plaintiff urge that the verdict and judgment are contrary to the evidence. They contend in substance (1) that it was a simple matter for defendant to figure out the cost to it of the electricity used by plaintiff from time to time during the entire period; (2) that defendant knew at all times that it was over-charging plaintiff for electrical power in violation of the provision contained in the leases; (3) that there was no evidence of the making of the two new verbal agreements for the flat rates of 4-1/2 cents and 3-1/2 cents per kilowatt-hour, and (4) that plaintiff's monthly payments of the bills as rendered at said flat rates were not made with knowledge of the surrounding facts and circumstances. After a careful review of the entire evidence we are unable to agree with any of these contentions. As to the two verbal agreements modifying the provisions in the leases and providing for said flat rates we think that the evidence shows that they were made, and that the evidence of their being made was admissible. (Snow v. Griesheimer, 220 Ill. 100; Jones & Bommersnas Co. v. Crary, 234 Ill. 24.) And, even if it be considered that the oral agreements were not actually entered into, the undisputed fact that plaintiff for a period of about ten years paid amounts which were in excess of the rates stipulated in the leases militates against any recovery by it of such excess upon the doctrine of voluntary payment, particularly so as it appears that plaintiff's president all the while felt or suspected that the amounts charged were too high and not in accord with the stipulation in the leases, and yet made no attempt to investigate and ascertain facts confirmatory of his suspicions but elected

to pay, and plaintiff paid, each month the amounts of defendant's bills as rendered. Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535; Frambers v. Hisk, 8 Ill. App. 499.) In the Frambers case it is said, (p. 503) quoting from Kelly v. Solari, 9 M & Selleby 59: "But if money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff, meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it. * * There may also be cases in which he might by investigation learn the state of facts more accurately. If he declines to do so and chooses to pay the money notwithstanding, in that case there can be no doubt he is equally bound."

Counsel for plaintiff further contend that the judgment should be reversed because of the giving of certain instructions offered by defendant. We have examined these instructions in connection with the evidence introduced, and are of the opinion that the trial court did not err in giving them.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

to Jay, and plaintiff paid, and made the security of defendant's title as warranted. Lightfoot v. Davis, [illegible] Ala. 111, 116; Cummins v. Ellis, 2 Ala. App. 494; 24 Am. Digest 1907, 1, 4; Ala. Dig. 7a, 8(1) quoting from Tyler v. Cobb, 2 W. & Malloby 49: "But if money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff, meaning to waive all inquiry into it, and that the person receiving shall keep the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it. * * There may also be cases in which he might by investigation learn the truth of facts more conveniently. If he continues to do so and abandon to pay the money unintentionally, in such case there can be no doubt he is equally bound."

Counsel for plaintiff further contend that the judgment should be reversed because of the giving of certain instructions offered by defendant. We have examined these instructions in connection with the evidence introduced, and are of the opinion that the trial court did not err in giving them.

The judgment of the Supreme Court is affirmed.

AFFIRMED.

Bates, C. J., and Davis, J., concur.

437 - 27395

KATERINA MASOVSKY,

Appellee,

v.

JAKUB BATKA and ANNA BATKA,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Filed Feb.16,'23.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants, Mr. and Mrs. Batka, seek to reverse a judgment recovered in the Municipal Court of Chicago by the plaintiff, Mrs. Masovsky, in the sum of $1850.00.

The main contention of the defendants, in support of their appeal is that the verdict and judgment are against the manifest weight of the evidence.

The plaintiff brought this action against the defendants, claiming compensation due her as wages for services rendered by her to them. That the plaintiff performed services for the defendants is not denied. There was, however, a direct conflict between the parties as to the amount of time put in by the plaintiff and as to the arrangement between them on the question of compensation.

Mr. and Mrs. Batka kept a small butcher shop and had living rooms in the rear, where they lived with their three children and Mrs. Batka's mother. The plaintiff, a widow nearly fifty years of age, lived in the neighborhood with her only son. It is not controverted that in November, 1917, the

plaintiff started to work for the Batkas. At or about this time, the plaintiff moved into the building in which the defendants had their home and their butcher shop, taking rooms on an upper floor. The plaintiff testified that she started to work for the defendants as a domestic; that she took care of the house, ironing the clothes and cooking; that the defendants asked her to help them in the butcher shop, and she did so, making sausages and dressing poultry. In connection with the butcher shop, the defendants had a room in the basement, known as the work room, and the plaintiff testified that part of her work was to keep that room cleaned up and to wash out the tubs, etc. The plaintiff further testified that she worked full time for the defendants from November, 1917, until August, 1920; that thereafter, she worked two days a week, Wednesday and Fridays, making sausages on Wednesday and dressing fowl on Fridays; that during part of the time, Batka had a helper, named Zelanka. She testified that Mrs. Batka helped her husband in the butcher shop, and her mother helped wash the dishes. At the time the plaintiff started working for the defendants, she testified that Mrs. Batka told her they had been unable to keep a helper because they did not have money to pay him; that she asked the plaintiff to come and work for them, but explained that they could not pay her immediately because they had some debts that had to be met; that they would pay the plaintiff later for her services; that the plaintiff asked her when they would pay and she said they would do it as soon as they possibly could. According to the testimony of the plaintiff, she had no talk with the defendants about pay, between the time she went to work for them and the beginning of January 1921, but that whenever she needed money she spoke to Mrs. Batka and the latter would pay her something;

plaintiff started to work for the defendant. At the start this time, the plaintiff moved into the building in which the defendants had their main and their tailoring body, having from as an upper floor. The plaintiff testified that she started to work for the defendants as a seamstress; that she took care of the house, ironing the clothes and cooking; that the defendants asked her to help them in the tailoring shop, and she did so, making measures and drawing patterns. In connection with the tailoring shop, the defendants had a room in the basement, known as the work room, and the plaintiff testified that part of her work was to keep this room cleaned up and to wash out the rags, etc. The plaintiff further testified that she worked full time for the defendants from November, 1937, until August, 1939; that however, she worked for them a year and a half. Edmundsen and Tilghman, acting partners at Tonsonboy and operating the firm as Tilghman; that during part of the time, Mrs. Edmundsen had a helper, named Jackson. The testimony was, when helped her brought in the tailoring shop, and her mother helped with the finishing. At the time the plaintiff started working for the defendants, she testified that Mrs. Edmundsen said she had been unable to keep a helper because they did not have money to pay him; that she asked the plaintiff to come and work for them, not realizing that they could not pay her immediately because they had some debts that had to be met; that they would pay the plaintiff later for her services; that the plaintiff asked how they would pay and she said they could do it as soon as they possibly could. According to the testimony of the plaintiff, she had no talk with the defendants about pay, between the time she went to work for them and the beginning of January 1941, but that meanwhile she needed money for groceries for herself and her mother and the latter would say her something

that these payments, from time to time, during the period in question, aggregated $448.00. It appears that during the time the plaintiff was working for the defendants, she got meat for herself and her son from the defendants butcher shop each day without being charged for it.

According to the testimony of the plaintiff, the defendants made no arrangement for any stipulated amount to be paid as wages but they promised to pay her what her services were worth. In the course of her cross-examination the plaintiff testified that the defendants had not paid her anything since August, 1920, but in the next question or two she admitted that during the two weeks of January, 1921, just before she left the defendants, they paid her $15.00 a week. It appears that a sister of Mr. Batka came to live with him and his wife shortly before the plaintiff left. Mrs. Batka had a niece, Rose Patrzalka, who, according to the plaintiff's testimony, never lived in Batka's home. In answer to questions on which it was sought to base a possible impeachment, the plaintiff admitted that she knew a man named Anton Tepinka, but she denied being in his place of business in the month of February, previous to the trial, or stating to him that she was going to ruin Batka and get even with him because he had discharged her; that Batka did not owe her but she was going to ruin him. The plaintiff testified that the reason for her leaving in January, 1921, was that she asked Mrs. Batka for her money several times and the latter stated that she could do nothing for her then but that they would pay her as soon as they got their mortgage paid; that at one time Mrs. Batka said they would giver her at least $1,000.

that those payments, from time to time, during the period in question, amounted $[illegible]. It appears that during the time the plaintiff was waiting for the defendants, she got work for herself and her son from the defendants without stop such as without being charged for it.

According to the testimony of the plaintiff, the defendants made no arrangement for any stipulated amount to be paid as wages but they promised to pay her what her services were worth. In the course of her cross-examination the plaintiff testified that the defendants had not paid her anything since August, 1941, but in January another of the sons admitted that during the two weeks of January, 1941, just before she left the defendants, they owed her $[illegible] a week. It appears that a letter of 1/2, Dutton came to live with him and his wife shortly before the plaintiff left. The Dutton had a place, then Fairbanks, Ala., according to the plaintiff's testimony. Some time in July, 1941, it seems, he moved to Anchorage, Alaska. It was held in July that one Dave a certain Immanuel, the defendant admitted that she knew a man named Anton Dutton, but she denied being in his place of business in the month of February, previous to the trial, or meeting in this that she was going to run before and get even with him because he had discharged her; that Anton did not use her but she was going to run him. The plaintiff testified that the reason for her leaving in January, 1941, was that she needed rest. Both for her money several times and the latter owned that she could do nothing for her that that they would pay her as soon as they could give her at least $[illegible].

The only testimony submitted to the jury in support of the plaintiff's claim, beyond that given by the plaintiff, herself, was that of the proprietor of an employment agency who testified as an expert on the value of such services as the plaintiff testified she rendered, placing the value at a minimum of $2.50 a day.

Mrs. Batka testified that the plaintiff lived in the building where she and her husband lived and maintained their butcher shop, in November, 1917; that her mother was then living with her and continued to live there up to March, 1919; that when the plaintiff moved into the building "she began to come down stairs to work for me. I never asked her to come; but it was of her own free will. I was talking to her and she said she was willing to do anything for me because I would take her out." It appears that the defendants owned an automobile and, on cross-examination, in her direct case, the plaintiff admitted that she had ridden out in this car with the defendants about twenty-five times. In this connection, on re-direct examination, she testified that when they came home she would wash the machine, sometimes that night and sometimes the next day.

Mrs. Batka further testified that when the plaintiff began coming down to work for them she only came about twice a week. At another place she says, two or three times a week. The plaintiff's son was married in June, 1920, and moved away. Mrs. Batka testified that up to that time the plaintiff never worked for her and her husband more than two or three days a week. She further testified that from the time the plaintiff started to render services in November, 1917, until the summer of 1919 she paid her $3.00 a week and from that time until her son was

The only testimony submitted to the jury in support of the plaintiff's claim, beyond that given by the plaintiff, himself, was that of the proprietor of an employment agency who testified on an expert as to the value of such services as the plaintiff testified she rendered, placing the value at a maximum of $2.00 a day.

Mr. Hugh testified that the plaintiff lived in the building where she and her husband lived and maintained their business and, in November, 1927, that her mother was living with her and continued to live there up to March, 1930; that she the plaintiff never left the building "she began to come down stairs to work for us. I never asked her to assist; she is one of my own blood kin. I was helping to her and she said she wanted to be a nurse; for the reason I said take her out." It appears that the defendant owned an automobile and, on cross-examination, in the direct case, the plaintiff admitted that she had ridden out in it on the defendant about twenty-five times. In this connection, on re-direct examination, she testified that when they came home she would wash the machine, sometimes that night and sometimes the next day.

Mr. Hugh further testified that from the plaintiff began coming down to work for him she only came about twice a week, another time she may, two or three times a week. The plaintiff's son was married in June, 1929, and moved away. Mrs. Hugh testified that up to that time the plaintiff never worked for her on any regular part but for at most only a few. The latter testified that from the time the plaintiff started to render services in November, 1927, until the summer of 1929 she paid her $2.00 a week and from that time until her son was

married in June, 1920, she paid her $5.00 a week every Saturday night and gave her meat besides. Although Mrs. Batka claimed the plaintiff only worked two or three days a week, she testified that she gave her meat for herself and her son every day, to the value of approximately $1.50 a day. During her direct examination, Mrs. Batka was asked whether she had any talk with the plaintiff regarding her employment, and she said, "yes," that she asked her whether she was satisfied with everything, and the plaintiff said she was, and that she then told her she would pay her $5.00 a week, which she did from that time on every Saturday night until her son was married. Mrs. Batka further testified that after the plaintiff's son was married the plaintiff worked Tuesday afternoons and all the remaining days of the week doing house work, and that she then paid her $10.00 a week up to the fall of 1920, and then for the last few weeks she was there, she paid her $15.00 a week. Mrs. Batka denied telling the plaintiff that she would pay her $1,000, or saying that she could not pay her because they had a mortgage to pay off, but said that her husband's sister came to live with them about January 5, 1921, apparently under an arrangement of employment, and that she then told the plaintiff that she could not keep both of them and her husband wanted to keep his sister; that at this time there was no talk between them about any back salary; that this conversation took place Saturday afternoon and the plaintiff left the next morning. Mrs. Batka testified that after her mother left, in March, 1919, her niece Rose Petrzelka helped in the house work.

At one point in her cross-examination Mrs. Batka testified that the plaintiff worked for her four or five days a week, before the plaintiff's son was married.

Rose Petrzelka testified that she worked for the Batkas about six months, from February, 1919, on, and that during that time a helper named Novotny was working in the butcher shop, and the plaintiff came there two days a week and cleaned up around the butcher shop, and helped around a little; that she saw the plaintiff get $3.00 from Mrs. Batka on "several pay days"; that Mrs. Batka said that this was the plaintiff's weekly salary and the plaintiff told the witness she was satisfied with what she was getting; that during these six months, the witness did the cooking and took care of the children and did all the kitchen work.

Mrs. Batka's mother, Mrs. Vilimek, a woman 78 years old, testified that during the time she lived with her daughter, the plaintiff came over to their place "every now and then"; that the witness did all of the kitchen work and the plaintiff did none of it, but that she dressed the fowl on Fridays and on Wednesdays she made sausages; that during this time the witness saw her daughter pay the plaintiff on Saturday several times. This witness testified that she "was driven away" from the Batkas by the plaintiff and that when this happened her grand-daughter Rose Petrzelka took herplace; that she did not think Rose stayed there very long because the plaintiff was "against her" too.

Anton Topinka testified that the plaintiff was in his store "about February" previous to the trial; that she was excited and said that if she wanted to she could ruin Batka, and could put him out of business, and if she wanted to she could have him sent to Joliet, but that she said nothing about money. "She never said that they owed her any money." At this point counsel for defendants asked this question: "You told me yesterday in the office that she told you in February of 1921,

that he does not owe her any money; Did you say that?" Objection was made to this and objection was sustained.

A woman who had done washing for Mrs. Batka for three years, working there on Mondays and Saturdays, testified that the plaintiff was working there but she did not know what she did,- that she saw her helping in the "work shop."

Jakub Batka testified that after the plaintiff moved into their building, in 1917, she helped with the sausages and the dressing of poultry, that this continued about three years. The witness testified through an interpreter and the latter stated that the witness said the plaintiff "would work two days all day, just helped occasionally"; that during this time she was working there occasionally, the witness asked her if she was satisfied with the $3.00 she was getting and she said she was; that during this time she was getting "eggs and meats and whatever was necessary for the kitchen"; that after July, 1920, she "was working there steadily"; that she was then getting $8.00 a week; that the witness asked her about this and she said she was satisfied; that later the plaintiff received $10.00, and beginning the first of January, 1921, she got $15.00 a week, until she left in the latter part of that month; that during the time the plaintiff was working for the defendants the witness asked her "about ten times, or even more" whether she was satisfied with what she was getting and that she answered that she was. On cross-examination, the witness was asked what brought about these numerous inquires and he said he was just anxious to know whether she was satisfied or not.

In support of their appeal counsel for the defendants argues that it does not seem likely that the plaintiff, a woman evidently supporting herself by her labor, would work under such

that he does not own her any money; did I in any "shift" [illegible] time she made to this not objection was mentioned.

A woman who had been working for us, Edith for three years, moving from [illegible] and laundering, testified that the plaintiff was working since but she did not know what she did.- that she was her helping in the "work room."

Edith Dalton testified that after the plaintiff moved into their building, in 1917, she helped with the massage and the dressing of poultry. That she assisted about three years. The witness testified showing an interpreter and the jurors showed that the witness said the plaintiff "could work the hole all day. Just about overwhelmingly, her doing this the one was writing here overwhelmingly, the witness when her it was was assisted with the 15.00 she was getting one she said she went; that during this time she was getting "eggs and meats and whatever was necessary for the kitchen"; that after duty, 1920, she "was working here overnight" and she was then paying 10.00 a week; that the witness asked her where she and the plaintiff was paid; that the plaintiff received 20.00, and taking the first of January, 1924, she got 25.00 a week, until she left in the latter part of that month; that during the time the plaintiff was working for the defendants the witness never "heard her name, or even name" whether she was satisfied with what she was getting and that she answered that she was. In cross-examination, the witness was asked what brought forth answers inquiries to be sent to the last employer to find whether she was satisfied or not.

In matters of light signal attempt for the testimonies argues that it does not seem likely that the plaintiff, a woman

uncertain terms as she claims existed, and would wait so long for her wages, nor would she be likely to be attracted by the proposition that the defendants could not pay for her services until sometime in the future, nor does it seem probable that the defendants would have made such a proposition to a woman who they knew but slightly. The testimony shows they had been acquainted a year, at the time plaintiff began to work for the defendants. These facts, counsel argues, do not commend themselves to reason. It may be that the situation which the plaintiff testifies to, in connection with her claim for wages, is not one which would commend itself to either counsel or the court, but we are not in a position to set aside a verdict of the jurors, who heard these witnesses testify and weighed the evidence, merely because it may seem strange that the plaintiff was willing to work as long as she admittedly did, and under circumstances which she testifies to.

There are a number of things, on the other hand, in connection with the testimony of the defendants, which do not appeal to reason and in a number of respects the testimony contains statements that can not be reconciled with others made by the same witnesses.

Judging of the testimony, as we must, only from the type-written page, we may not be wholly convinced that the plaintiff should recover what the jury found was due her from the defendants, but that is not our problem. We have only to determine from our examination of the evidence whether it is such that we can say that the action of the jury in returning their verdict, and the court in confirming it, was such as to be against the manifest weight of the evidence. The evidence in this record is not such as to permit us to reach that con-

appropriate terms on the finished product, but would wait so long for the reason, for which the publicity is attributed by the prosecution that the defendants could not pay for their services until receiving it for filing, we think it also probable that the defendants would have made such a provisioning in a reason too long near but likely. The testimony shows they had been associated a year, at the time defendant began to work for the defendants. These facts, related argues, do not convince this review in reason. It may be that the witnesses which the plaintiff invitation to, in connection with the claim for wages, do not see which would command itself to a jury verdict or the court, but we are not in a position to say that under a verdict of the jury, the jury [illegible] jurisdiction to reload the evidence, which leaves it not. We think that the plaintiff was willing to work as long as the additional aid, and under circumstances that the defendant to.

There are a number of things, on the other hand, in connection with the testimony of the defendants, which do not appeal to reason and in a manner of regarding the testimony contains evidence that can not be reconciled with others made by the same witnesses.

Judging of the testimony, as we read, only from the type-written page, we are not in a position accurately that the plaintiff should receive what the jury found was due her from the defendants, but that is not our problem. We have only to determine from our consideration of the evidence whether it is such that we can say that the action of the jury in rendering their verdict, and the court in confirming it, was such as to be against the manifest weight of the evidence. The evidence

clusion. The testimony is in hopless conflict and it contains not a few contradictions. Such being the situation, the conclusion which the jury reached must stand.

The defendants further urge that the judgment is not sustained by the verdict in that the verdict finds the issues "against the defendant" instead of the defendants. In Lambert v. Morden, 10 Ill. App. 648, the verdict as recorded by the clerk of the trial court found "the defendant" guilty, although there was more than one defendant involved in that case. The question arose as to whether this court might look to the original verdict returned by the jury and ascertain its form, but it was held that this court could ascertain the finding of the jury "from the recorded verdict and from that alone." The record of the verdict in the case at bar is to the effect that the jury found the issues "against the defendants." However, we are of the opinion that it would not be ground for reversal, in any event. Bacon v. Schepflin, 185 Ill. 122.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

446 - 27494

R. JAMS, doing business as
JULIAN DRESS COMPANY,

Appellee,

v.

SAMUEL NIRENSTEIN & COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

23 I.A. 331

Filed Feb. 16, '23.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment recovered by the plaintiff, Jams, in the Municipal Court of Chicago, for the sum of $399.00. The plaintiff was in the business of manufacturing dresses, in the City of Chicago. The defendant was in the silk business in the City of New York. It had a salesman in Chicago, whose name was Hotine.

The plaintiff based this action on a claim for damages, for the breach of an alleged contract, by the defendant, wherein the plaintiff agreed to buy and the defendant agreed to sell, five pieces of black taffeta silk and twenty pieces of colored taffeta silk. It was the position of the plaintiff that the order for this silk was given to the defendant's representative, and accepted and confirmed by the defendant, but that the defendant had failed to deliver the silk to the plaintiff's damage in the sum of $1406.25. The defendant admitted receiving the order, but took the position that the order specified certain terms of payment which involved an extension of credit to the plaintiff; that these terms were not accepted by the defendant, and that the plaintiff was noti-

Filed Feb. 16, '22.

fied that the credit would not be extended unless a financial statement was submitted to the defendant and approved by it; that a financial statement was submitted, which was incomplete and not acceptable and that the plaintiff was notified that the goods in question would be sold on a cash basis only, and the plaintiff declined to pay cash; that the defendant, thereupon, disposed of the goods in question to others, and after that had been done, the plaintiff offered to pay cash, whereupon, the defendant advised the plaintiff that the goods had been sold.

In our view of this case, it is essential to determine whether the plaintiff's order for the goods in question was confirmed or accepted by the defendant. To determine that question, it is necessary to consider chronologically the various communications had between the parties so far as they may affect the transaction which is involved in this controversy.

On December 1, 1920, the defendant's salesman, Hotine, received the plaintiff's order for 25 pieces of taffeta silk, at the latter's place of business in Chicago. A copy of the order was delivered to the plaintiff. The order as made out in writing contains a notation to the effect that the terms of payment are to involve a credit of 60 days. Hotine testified that he put a question mark after that item on the copy sent to the plaintiff and that he told the plaintiff he would try to get an extension of 60 days credit on this order. Hotine further testified that after he received the order, he returned to his office, in Chicago, made up the order in writing, in four copies, retaining one for himself, sending two copies to the defendant's office in New York, and mailing the other to the plaintiff.

The witness, Frank Jame, the husband of the plaintiff, testified that the copy of this order, which the plaintiff received, did not come from Chicago but from New York. It seems quite apparent that Ketine was right when he says that he mailed it from his office in Chicago. It bears every evidence of being a form of order blank used by salesmen, for at the bottom of the order is a statement reading: "This order subject to confirmation by Samuel Kissmann & Co., Inc."

On the same day, December 16, 1920, the plaintiff gave Ketine another order for one piece of retain Charmeuse, he giving the plaintiff a similar copy of the order, containing the same sentence as quoted above, and on this order the terms also involved a credit of 60 days. The order for the taffeta seems to have involved something over $1800.00, while the order for the Petaine Charmeuse involved only $66.00. It seems that the order last referred to was filled right away, for there appears in the evidence an invoice involving that order, under date of December 18, 1920, and on that invoice the terms are stated as "cash."

The order for the taffeta silk called for 5 pieces of Black and 20 pieces of Colored Silk, and the order stated that the assortment of colors would be given by January 1. This order also provided that deliveries were to be made in January, February and March, 1921. Nothing further was done until December 28, 1920, when the defendant's agent in Chicago called on the plaintiff with a "color card" and at this time, an "assortment and delivery" order was made out and applied to the order of December 16, for the taffeta silk. This specified 5 different colors and gave the number of pieces of each color to be delivered, some at once, some on January 15, some on

In minutes, there were, the members of the plaintiff, testified that the city of Los Angeles, which the plaintiff represents, did not come from Illinois but from New York. It seems quite apparent that unless our courts are to say that the United States Supreme Court is wrong in its judgment, it then is active in Illinois. It bears every attributes of being a firm or other black mark by Illinois. For as the person of the plaintiff is a resident reality "this case involves a petition filed by Samuel Gleason & Co., Inc."

On the same day, December 14, 1950, the plaintiff was petition another order for one piece of basic transmission, giving the plaintiff a similar trip of the order, containing the same statement as quoted above, and in this order the same time involved a credit of $[illegible] Inc. The court for the defendants seems to have involved monthly over [illegible], until the trial for the retaine transmission involved only [illegible]. It seems that the order had referred to was filled right away, for there appears in the opinion in article involving this order, under date of December 18, 1950, and in that instance the order was called an "oral."

The order for the lattern will initial for 5 pieces of [illegible] and 50 pieces of [illegible] 1950, and the order stated that the statement of orders would be given by January 1. This order for also private that defendants were to be made in January, February and March, 1951. During February was just until December 20, 1950, when the defendants appear in Illinois making an the plaintiff with a "major order" and at this time, on "conference and delivery" order was just put and equipment in the order of December 20, for the lattern pin. This resulting a different delivery date the number of pieces of such order

February 15, and some on March 15. On the same date the defendant's agent, Hotine, seems to have taken another order from the plaintiff. This order involved one piece of Black WG Charmeuse and 2 pieces of Petain Charmeuse, one Marine and one Black. This written order also called for terms involving a credit of 60 days. This order involved an amount of $154.00 and apparently it was filled by the defendant immediately.

An invoice involving these items was introduced in evidence and it is dated December 31, 1920, and it states that the terms covering the invoice are "cash".

On the same date, December 31, 1920, the defendant wrote the plaintiff a letter saying:

> "We are in receipt of your order placed with our Mr. Hotine, for which kindly accept our thanks.
> Beg to advise you that we have forwarded the pieces of WG Charmeuse and the two pieces of Petain Charmeuse today via Express, and trust they will open up to your entire satisfaction."

The plaintiff contends that this letter was a confirmation of the order for taffeta silk which is involved in the claim for damages on which this suit is based. We are not able to see any connection between this letter and the order for taffeta silk. It very apparently refers to the order of December 28, 1920, for the WG Charmeuse and the Petain Charmeuse, the goods mentioned in the letter. It will further be noted that the letter was sent out on the same date that the invoice was sent, covering the same goods.

Under date of January 10, 1921, the defendant sent the plaintiff a statement covering the invoices of December 15, and December 31, which have been referred to, these invoices covering the order for Petain Charmeuse given on December 16,

and that for 50 Charmeuse and Petaine Charmeuse given on December 23. This statement contained the words "Net. No Discount".

Under date of January 11, 1921, doubtless before receiving the defendant's statement last referred to, the plaintiff wrote the defendant, referring to the order which had been placed with Hotine for the taffeta silk, and stated that samples were to be shipped at once but "as yet have not heard from you. Kindly advise how soon we may have same." Three days later, namely, on January 14, 1921, the plaintiff acknowledged receipt of the defendant's statement of the 10th, calling attention to the fact that the orders taken by Hotine called for payment on a 60 day basis, and adding that if the defendant preferred to have the plaintiff pay "7-10", which, we understand from the testimony, means on a cash basis, check would be forwarded, "if you don't think we are entitled to regular terms." In this letter the plaintiff again inquired about the taffeta and called attention to the fact that samples were to be shipped at once.

The defendant replied to that letter, under date of January 18, 1921, stating that the terms on which the defendant had been doing business with the plaintiff had been on a basis of 10 days,- that the agent, Hotine, had sent in the plaintiff's orders marked 60 days, but that these terms were subject to the defendant's credit department, and as yet they had not been approved. This letter went on to say that in order that the defendant might determine whether the plaintiff was entitled to a credit of 60 days, the defendant wanted the plaintiff to furnish a financial statement of recent date, on the blank which was inclosed for that purpose, and also the names of some New York houses with whom the plaintiff was deal-

ous that for 30 thousand and taking documents given on October 20th. This statement contained the words "Yes, 30 thousand".

Prior date of January 23, 1963, notwithstanding receiving the defendant's statement last referred to, the plaintiff wrote his defendant, referring to the order which had been placed with him for the twelve oil, and stated that matters were to be adjusted at once but "we yet have not heard from you. Kindly advise how what we may have amount". This was again ignored. Finally, on January 28, 1963, the plaintiff acknowledged receipt of the defendant's statement of the 20th, making reference to the fact that the orders taken by twelve months for payments on a 90 day basis, and adding that if the defendants wishes to have the plaintiff pay "2-30", which, on reference from the statement, means on a 2 month basis, money would be forwarded. "If you don't think it is worthwhile to continue business." In this letter the plaintiff again inquired about the matters and called attention to the fact that another note is to be delivered at once.

The defendant replied to that letter, under date of January 29, 1963, stating that he never on with the transaction had been doing business with the plaintiff not from on a basis of 30 days,- that the agent, Hollins, had been in the plaintiff's office months 30 days, but that there terms were unknown to the defendant's credit department, and as yet they had not been advised. This letter was on to my that in order that the defendant might determine whether the plaintiff was entitled to a credit of 30 days, the defendant wanted the plaintiff to furnish a financial statement of recent date, on the blank which was included for that purpose, as also the amount of work for that purpose with which the plaintiff was identi-

ing, and the plaintiff was told that upon receiving that statement, the defendant would give it full investigation and would then report to the plaintiff. The writerof this letter added that the samples inquired about would be ready shortly, "so please send this information without delay."

The financial statement was forwarded by the plaintiff, several days later and was received by the defendant January 26, 1921. The statement was based on an inventory taken in June, 1920, and many of the questions contained in the statement had not been answered by the plaintiff at all. On January 28, 1921, the defendant telegraphed their agent, Hotine, as follows:

> "Julian Dress Co., statement received today from inventory June first nineteen hundred twenty. Neglects to answer all our questions. We want a January nineteen twenty-one statement. Meantime cash only. Will not hold goods. Advise by wire."

It appears from the evidence that upon receipt of this telegram, Hotine called upon the plaintiff and exhibited the telegram, and was told the plaintiff would not pay cash, for he telegraphed the defendant under date of January 27, 1921, (apparently by a night letter sent January 26, for the telegram bears date "January 27, A.M. 12:30") as follows:

> "Relative Julian Dress Co. They advise they only take inventory yearly June first hence cannot send one as of January nineteen twenty one will answer neglected questions if wanted meantime will accept mdse delivery as ordered on ten day terms especially the sample pieces right through wanted will not pay cash advise what you do."

Under date of January 27, 1921, the plaintiff wrote the defendant a letter, saying that Hotine had been in to see them and had shown them the defendant's telegram, and the

ing, as the plaintiff was told that a new invention was mainmen, the defendant would give it full investigation on our world than merely in the generality, the minimal fact latter might that the media impress about would in fact activity. The issues read this information without delay."

The financial statement was corrected by the plaintiff, several days later and was received by the defendant Jhonny on, 1[illegible]. The sentences are based on an interview later in June, 1[illegible], and some of the questions contained in the statement has not been answered by the plaintiff at all. Jhonny [illegible] the [illegible] statement that stated, [illegible], as follows:

> "Million dates in., statement received today from Jhonny June 1[illegible] minutes monitor month. Employees to power all our questions. We need a domestic minimum transparent strategy. Exercise month only. Will see hold grade. Advice by delay."

"[illegible] from the statement that was clearly of the judgment. Prior talks also the plaintiff and withdrawal the judgment, and was left the plaintiff making his own call. Jhonny [illegible] the [illegible] which [illegible] of Jhonny on, [illegible], [illegible] by a small letter and Jhonny on, for the judgment there date "Jhonny on, [illegible], [illegible] as follows:

> "Unlikely dollar house do. The notice they only have invested yearly lost issue cannot mean our as of January interest tempt one will mean our multiple questions if wanted monitors will accept more minimum or answers on the day issue consistently the notice issue right through month will not may with after that yes day?

Under date of January 27, 1[illegible], the plaintiff wrote the defendant a letter, stated that [illegible] had been [illegible] that not had [illegible] the [illegible]. Jhonny and the

plaintiff expressed surprise and said: "If you prefer us to pay you ten days we are perfectly satisfied." They then made some reference to the financial statement they had sent down to the defendant, and then said:

> "Trusting you will consider this matter thoroughly and favor us with a reply and if not you may send us two sample pieces of taffeta as stated for cash and if satisfactory you may send the balance for cash."

Two days later, namely, on January 29, 1921, the plaintiff sent the defendant a telegram reading as follows:

> "If no other way ship for cash wire answer."

Hotine testified that on January 31, 1921, he received a letter from his principal, the defendant, and after receiving the letter he telephoned the plaintiff and talked with Frank Jame and asked him if he had sent the defendant a telegram saying: "If no other way ship for cash" and that Frank Jame said he had, whereupon, Hotine told him that he had just received a reply from the defendant, stating that they had received his telegram, but, as the plaintiff would not pay cash, the merchandise had been sold. This ended the correspondence between the parties relating to the order in question, except a letter of February 1, 1921, from the plaintiff to the defendant, in which the plaintiff told the defendant that the latter would be considered liable for any damages resulting from their failure to fill the order.

It appears from the evidence that the plaintiff had previously made a good many purchases of silk from the defendant through its agent, Hotine, and it also appears from one of the letters, referred to above, that these purchases were on either a cash basis or a basis of payment within ten

days. The order for taffeta silk involved here called for 60 days credit. It was for a considerably larger amount than any of the other orders, to which the evidence makes reference. But, in any event the order could not ripen into a contract, until it was either confirmed or accepted by the defendant. The evidence shows without contradiction that the agent Hotine had no authority as such agent, other than the taking of orders and forwarding them to the defendant for confirmation.

In addition to being subject to confirmation by the defendant, the order in question was apparently further subject to the approval of samples by the plaintiff. In the letter of January 11, 1921, from the plaintiff to the defendant, the plaintiff refers to this order for taffeta silk; reminds the defendant that the samples were to be shipped at once, and says they have not been received and asks how soon they may expect them, and, in the plaintiff's letter of January 14, the defendant is again reminded of the same matter. In the defendant's letter of January 18, replying to the plaintiff's letter of January 14, after advising the plaintiff that the request of the latter for 60 days credit cannot be approved unless the plaintiff furnishes a satisfactory financial statement, the defendant requests the plaintiff to submit such a statement, and says that as soon as it is received it will be fully investigated and the defendant will then report, and, in this connection, the defendant requests the plaintiff to sign this statement, without delay, as the samples which are to be furnished will be ready within a few days.

It further appears that after the financial statement, requested by the defendant, had been furnished by the plaintiff,

days. The order for traffic will involve both notice to the days parade. It has for a considerably larger amount than any of the other orders, in which the evidence needs reference. But, in any event the order could not stand into a question, which is now either moot or answered in the defendant. The minimum amount actually contemplated for the equal rights has to minimize as with equal, while from the notice of events and transmission from to the enforcement constitutions.

In addition to legal objected in modifications to the defendant, the order in question was necessarily further subject to the amount of damages by the plaintiff. In the Saturday of January 14, 1923, from the plaintiff to the defendant, the plaintiff refers to this order for traffic with including the defendant that his counsel have to be stopped at some, and says they have not been received and make the same long and report them, and, in the plaintiff's letter of January 14, the petitions in order remained of the same matter. In the defendant's letter of January 15, refers to plaintiff, the plaintiff letter of January 14, other concerning the plaintiff that the rights of the latter for it does which cannot be considered before the plaintiff functions a multi-letter commercial statutes, the defendant requests the plaintiff to submit such a statement, and says that as soon as it is received it will be fully investigated and the defendant will then report, and, in this connection, the defendant requests the plaintiff to make this statement, without delay, as the results which are to be furnished will be ready within a few days.

In further answers this also the financial statements.

it was not satisfactory and the defendant wired its agent, calling for more information, and stating that in the meantime no goods could be furnished to the plaintiff except on a cash basis. The agent showed that telegram to the plaintiff and there can be no doubt, from the evidence, that the plaintiff refused to pay cash. The agent wired his principal, the defendant, to that effect. On the same date, January 27, the plaintiff wrote the defendant what amounted to a new proposition. After proposing to pay for the goods on a 10 day basis, it was suggested that 2 sample pieces be shipped on a cash basis, and if these were satisfactory the balance might be sent for cash. The telegram from the agent, sent on January 27, was received by the defendant the same day. Necessarily, the plaintiff's letter of January 27, was received on January 28, at the earliest.

It is apparent from what has been said that the minds of these parties never met on this contract, and when the plaintiff failed to meet the defendant's requirements in order to establish a 60 day credit basis, and definitely declined to pay cash, on January 27, the defendant had a right to consider the deal off. And, after advising the defendant's agent to theteffect, that they would not pay cash, on January 27, they could not, thereafter, as they attempted to do on January 27, advise the defendant that they would pay cash if there was no other way, and thereby revive the defendant's previous offer to sell for cash.

There never having been a binding contract for this silk, between the plaintiff and the defendant, plaintiff cannot recover damages for the defendant's failure to deliver

It was not mandatory, but the reference issue is moot, although far more interesting, and strong that in the condition we could never be included in the plaintiff except on a mere basis, the court ruled that between the plaintiff and this one was by no means, less the plaintiff refused to pay court. The court stated his reasoning, the defendant, to such effect: In the case at bar, January 27, the plaintiff sues the defendant what amounts to a six months. Since the number in dog for the goods on a 12 day basis, it was contended that a single clause be signed on a month basis, and it since was misleading the issue still is not the case. The balance from the goods, such as January 27, are covered by the document the same day. Necessarily, the plaintiff's claim of January 27, was contained in January 26, or the month.

It is obvious from this has been said that the claim of these points never was in this controversy, and when the plaintiff failed to sue the multiple repudiations in order to establish a 30 day credit basis, and definitely declined to pay cash, on January 27, the defendant had a right to discharge his cash all. Yet, after entering the delinquents agent to identifies, that they could not pay cash, on January 27, they could not, therefore, so they attempted to do so January 27, after the defendant has they would pay cash i there was no other way, and thereby invoke the contractual provisions offer to sell for cash.

Since never having been a binding contract for this sale, between the plaintiff and the defendant, plaintiff cannot recover damages for the defendant's failure to deliver

the silk.

The judgment of the Municipal Court is, therefore, reversed.

REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

27413

455 - 27413.

LOUIS RYBEK,

Appellee,

v.

LE-MIEUX-SIMS LABORATOIRE,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Filed Feb. 16, '23.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $632.50, recovered by the plaintiff in the Municipal Court of Chicago.

The plaintiff brought this action to recover an amount claimed to be due him for wages.

It appeared from the evidence that a Madame LeMieux was in business manufacturing and selling cosmetics. For a time, she and one Sims conducted the business as partners and on February 1, 1921, they organized the defendant corporation. At that time the corporation took over all the assets of the business, as it had previously been conducted, and assumed its liabilities. The plaintiff worked for Madame LeMieux from August 15, 1920, up to the time the corporation was organized, at which time he was engaged by the corporation at a salary of $150.00 a month, and continued to work for said corporation up to March 6, 1921, when he discontinued his services.

It was admitted by the affidavit ofmerits filed by the defendant that at the time the corporation was organized an accounting was had between the plaintiff and Madame LeMieux

and the corporation and it was determined at that time that there was due the plaintiff, for services, the sum of $825.00. But it was the defendant's position further that during the period of his employment from August to February the plaintiff had boarded with Madame LeMieux and was indebted to her, for room rent and board, to the extent of $597.00, which amount should be charged to the plaintiff. Madame LeMieux was called as a witness for the defendant and she testified that when the accounting was had, at the time the corporation was organized, and the amount due the plaintiff as wages was determined, it was further agreed that the plaintiff was to pay her for his board when he got his money from the firm; that she was to look to the plaintiff for the amount due on his board and not to the corporation. It would seem from this to be clear that the corporation would not be entitled to charge the amount due from the plaintiff to Madame LeMieux, for his board, against the sum due him for services. The defendant contends that the court erred in admitting in evidence certain letters that passed between the plaintiff and Sims, prior to the time the plaintiff began his employment with Madame LeMieux. It appears that Sims then also had some interest in Madame LeMieux's business. The letters do not seem to have been very material, but they certainly did the defendant no harm. The defendant contended that certain payments had been made to the plaintiff, by way of salary, previous to February 1, 1921, and, among others, a payment of $50.00 by way of a check drawn to his order and dated December 1, 1920. The plaintiff testified that he used this check to make a payment to another concern on the defendant's account and in order to disprove this, the defendant offered a statement of its account with the concern referred to, together with checks drawn by the defendant to the order of that concern, in payment of the account. The court

sustained objection to the offer of this proof, and that ruling is assigned as error. We cannot so consider it, in view of the admission of the defendant in the affidavit of merits to the effect that there was $825.00 due the plaintiff for wages at the time the corporation was organized which is the exact amount claimed by the plaintiff in his statement of claim.

It appears that at the time the accounting was had the plaintiff agreed to accept $600.00 to clean up his back salary, $100 to be paid at once, $200.00 on March 1, 1921, and the balance later. The $100.00 payment was made, and at the time he left the employment of the defendant he demanded the $200.00 payment. It seems that the plaintiff was paid the salary which accrued after February 1, 1921. As we read the evidence, the plaintiff would be entitled to a judgment of $725.00.

It is impossible to determine just how the jury reached the figure of $632.50. But, as the plaintiff does not complain that the judgment is too small, it will be affirmed, as we find no reversible error in the record.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

contained objections to the action of this period, the court was
not in agreement on issues. The manner in consider it, in view
of the emergency of the situation in the military or civil
to the effect that since mobilization was the principal the action
of the same the municipalities was organized which in its means
would obtained by the plaintiff in the alternative of action.

It appears that at and have are mentioning the
the plaintiff issued in orders for to close by the base
molest, also to at that at day, [illegible] in issue i, that,
and the latter taken. The [illegible] appears the case, was at
the that is left the military at the [illegible] because
the [illegible] damage. It seems that the plaintiff was [illegible]
the albeit which arrived after January 1,1942. In the case
the evidence, the plaintiff would is entitled to a judgment
of $[illegible].

It is impossible to determine just the due case
quoted the figure of $[illegible]. But, as the plaintiff does
not complain that the judgment is too small, it will be
affirmed, as it has it irrevocably given by the court.

[illegible]

[illegible]

473 - 27431

LOUISE HYDE,
Appellee,

v.

J. S. McLAUGHLIN, etc.,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

226 Ill. App. 89

Filed Feb.16,'23.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, McLaughlin, seeks to reverse a judgment for $8,000.00, recovered by the plaintiff, in the Superior Court of Cook County, in an action for damages resulting from injuries received by her when she was struck and knocked down by a runaway horse, which is alleged to have been left standing in the street, without having been securely fastened, as required by an ordinance of the City of Chicago.

The plaintiff, Miss Hyde, is a teacher in the Chicago Latin School. At the time of the occurrence in question, which was January 26, 1918, she was about 24 years of age. A very heavy snow had fallen that day, leaving the streets in such condition that the defendant, who ordinarily used automobile delivery trucks in connection with his business, had to abandon their use and hire a horse at a nearby livery and use a small bob-sled, in which a large laundry hamper was placed containing the various bundles to be delivered to his patrons.

At about six o'clock on the evening of the day above

referred to, the plaintiff was waiting to take a southbound street car on Broadway at Thorndale avenue. The snow which had been falling during the day had been cleared off from the street car tracks and at the point where the plaintiff was waiting to take the car, there was about enough space between the car tracks and the piles of snow to permit a wagon to pass. A car did not come along for some time and when one did come there were about 25 or 30 people waiting to board it. In the meantime, the plaintiff had walked into a drug store, where she was waiting. As the car came up the plaintiff came out of the drug store and walked over toward the car. She was apparently on the edge of the crowd and would have been about the last one to get on.

The defendant's employee, who was making deliveries with the horse and bob-sled, had occasion to make a delivery on a nearby street, at about the middle of the block. There was so much snow in the street that he left the horse at the corner of the nearest intersection, went up to the place of delivery and made it, and as he was returning the horse apparently became frightened when a coal truck passed him with some metal coal chutes hanging on the side of it, which made a rattling and banging noise as it passed. The horse ran away, and when six or seven of the group that were waiting to get on the car at Broadway and Thorndale avenue were remaining in the street, the horse came running down the street car tracks behind the car, and as it reached the car it swerved over into that part of the roadway which was free of snow and dashed into the group of people who were standing there, knocking down the plaintiff as well as several others, and thus inflicting the injuries of which the plaintiff complains in the suit at bar.

On the evidence in this record it cannot be held that the plaintiff was guilty of contributory negligence, as a matter of law as the defendant contends. This occurrence happened after dark. It had been snowing most of the day and the snow was piled up in the street. There were many people boarding the car at the time the plaintiff was attempting to do so. The evidence is to the effect that there was no noise of any kind, nor any warning of the approach of the runaway horse. The plaintiff testified that she never saw the horse or the cab-sled or knew that it was anywhere around, nor did she have any intimation of any unusual occurrence until she realized that she was being knocked down. The question of contributory negligence was one for the jury and the jury was clearly right in taking the position that there was none.

The declaration filed by the plaintiff complained that the defendant had been negligent in that his servant had failed to "restrain, fasten, hitch or otherwise control the said horse and sled", so that the horse ran away and struck her. In another count the plaintiff pleaded an ordinance of the City of Chicago, providing that no person shall leave any horse attached to any vehicle in any public street "without securely fastening such horse", and alleged that the defendant, through his servant, on the occasion in question, failed to comply with the terms of that ordinance and left his horse and sled on a public street without securely fastening the horse, and that by reason thereof, the horse ran away and struck the plaintiff.

The defendant contends that the plaintiff failed to prove that the negligence of the defendant, as alleged in the

declaration, namely, his failure to securely fasten the horse, was the proximate cause of her injury. Assuming that the defendant's horse was not securely fastened, as the jury found, which would amount to negligence of the defendant's servant, that negligence was the proximate cause of the plaintiff's injury, even though the thing which frightened the horse and caused it to run away, be considered as the negligent act of a third person. The injury of the plaintiff would not have occurred if the horse had been securely fastened. The proximate cause of an injury is that act or omission which immediately causes the injury, and without which it would not have happened, notwithstanding other conditions or omissions concurred with it. Miller v. Kelly Coal Co., 145 Ill. App. 452.

The defendant further contends that the judgment recovered by the plaintiff failed to make out a prima facie case on her charge that the defendant had been negligent in failing to securely fasten his horse. The evidence of the plaintiff's witnesses, to the effect that the horse was running away, unattended on a public street, together with the introduction of the ordinance of the city prohibiting the leaving of a horse in any street, attached to any vehicle, without securely fastening the horse, established a prima facie case on the part of the defendant. Devine, Admr. v. Kfrelzer, 195 Ill. App. 221.

The testimony of the defendant's servant to the effect that he had used an iron weight, with a strap and buckle, to hitch the horse at the time he ran away, and that when he reached the horse immediately after the occurrence

in question, the buckle and a piece of the strap were still attached to the horse's bridle, and the testimony of the plaintiff's witnesses to the effect that they did not see any such strap hanging from the bridle; and of one witness to the effect that the defendant's servant had stated, not long after the occurrence, that the horse had not been hitched when it ran away; and the testimony of the police officer, who witnessed the accident, to the effect that he reprimanded the defendant's servant for not having his horse hitched, and that the servant did not then take the position that the horse had been tied, presented to the jury the issues of fact as to whether the horse had been fastened at all, and also as to whether, if fastened, it had been securely fastened. It is not contended that the jury's findings on these questions of fact were against the manifest weight of the evidence, nor do we think that such a contention could be successfully maintained.

The defendant tendered, and requested the court to give the following instruction:

> "You are instructed that while you are the judges of the credibility of the witnesses, you have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant, simply because such witness was or is an employe of the defendant, but it is your duty to receive the testimony of such witness in the light of all the evidence the same as you would receive the testimony of any other witness and to determine the credibility of such employe by the same principles and tests by which you determine the credibility of any other witness."

The court refused to give this instruction and defendant contends that ruling was error. In The Chicago & Previso Street Ry. Co. v. Rollins, 195 Ill. 219, practically this identical instruction was tendered and the court modified it by

adding several words which need not be noted here, and the Supreme Court criticised the modification, and at least by implication, approved the instruction as tendered, pointing out another instruction which was given and saying that in view of the latter instruction, together with the modified instruction, considered as a whole, in the light of the evidence, the jury could not have been misled.

We are of the opinion that the action of the trial court in refusing this instruction was not reversible error. The same instruction was offered by the defendant in Carnegie Adgr. v. Gerlach, 208 Ill. App. 340, and was refused, and, as here, its refusal was alleged to be error, but it was there held that the instruction was of doubtful propriety and that the trial court had not been in error in refusing it, since the court had given the jury an instruction directing their attention to the proper and approved tests which applied to all witnesses. Such an instruction was also given in the case at bar.

In our opinion a more serious contention is advanced when the defendant urges that the damages awarded by the jury were excessive. We have carefully examined all the evidence bearing on that question. The plaintiff had been a very healthy young woman up to the time of this accident. She had enjoyed and engaged in athletics, such as swimming and skating, but after the injury she had to give these up, and at the time of the trial had not been able to resume them, because they caused her discomfort and pain in her back. When the plaintiff was knocked down she received a deep cut under her right eye and she testified she lost consciousness and when she regained it she was in the drug store; that she

was very weak and had pains over her head. She was taken in an automobile from the drug store to the home of her family physician where the wound on her face was dressed and sewed up, and the physician's son then took the plaintiff home on a street car. The plaintiff was confined to her bed for the next three weeks, during which time she experienced a great deal of pain. Her right side and back were badly bruised. The plaintiff testified that since this injury, whenever she became tired the lower lid of her right eye twitched a great deal. The principal development that the plaintiff experienced after her injury, and on which the jury doubtless based the amount of their verdict, was one the plaintiff described as spells. She testified that whenever she experienced one of those spells it would be preceded by nausea and an excessive flow of saliva which she could not control; that she would experience involuntary contraction of the muscles of her hands and arms and that finally she would no longer be able to stand on her feet and would fall to the floor, and that these spells would last for variable periods of time, and left her very weak. She testified that these spells were likely to come on when she was tired or exhausted; that at first she experienced them, "sometimes twice a day, according to the exertion", and that it would take several hours to recover from them; that during the first year after the injury in question she had these spells sometimes once a week and sometimes two or three times a month; that they occurred at the school at which she taught, in her home, and, on one occasion, out on the steps in front of her home; that during the second year following the injury, she had them less frequently, but that those she did have were more severe; that during the third year she had three such spells, and that the last one

who had experienced about a week prior to Christmas, preceding the trial, which was in the early part of April. The plaintiff further testifies that she returned to her teaching some five or six weeks after the injury but that she had to give up a part of her work, but that during the year prior to the trial she had resumed all of the work she had been carrying on prior to the injury. She testified, however, that she had much less strength than she had enjoyed prior to the injury; that her nervous system was "not as strong as it should be"; that her weight was very much lower; that her appetite was only fair; that she slept very lightly, while she had been able to sleep well prior to the injury; that since the occurrence in question, she had been very nervous, although previously she had enjoyed perfect health. At the time of the injury the plaintiff was earning $85.00 a month. At the time of the trial she was receiving $100.00 a month, due, she testified, to a horizontal raise in salaries at the school. On cross examination she testified that she had not had occasion to consult her family physician for a year prior to the trial; that the occasion of her consultation with the doctor the last time she saw him was the fact that she was troubled by extreme nervousness; that the doctor had then prescribed a tonic but that she was taking nothing in the way of a tonic or medicine at the time of the trial.

The plaintiff's family physician described the cut under the plaintiff's right eye and said that when he gave the plaintiff a thorough examination the morning following the injury, he found a great many bruises on her body; that shortly after the injury occurred the plaintiff had consulted him with reference to the spells referred to, which he described as slight epileptic convulsions or petit-mal epilepsy;

that these spells came through an injury. He testified that he had never observed the plaintiff while she was experiencing one of these spells, but he described a spell of the type in question, saying that the muscles of the hands and face would contract; that the subject would fall in a fit, foam at the mouth, become more or less livid in color and that the spell was frequently preceded by nausea. He was asked a hypothetical question, including all the elements involved in this case, and he stated that in his opinion there would be sufficient in the accident described in the question, to bring about these so-called spells. He stated that the spells were due to an injury to the brain. He was asked if he had an opinion as to whether or not this condition might or might not be permanent, and his answer was: "It may be permanent." On cross-examination the doctor testified that he based his opinion, to the effect that the spells experienced by the plaintiff were a light type of epilepsy, on a description of them which several people had given him; that he based his opinion, to the effect that the spells were due to the injury, largely on the history of the case, namely, the fact that the plaintiff had always been perfectly well up to the time of the accident, but since then had experienced these so-called spells, and he further stated that the injury to the plaintiff's brain, which was the underlying cause of the spells, might have resulted from the blow which produced the cut on her face.

On re-direct examination, counsel for the plaintiff brought out a matter which had not been mentioned up to that time, asking the doctor whether he recalled the plaintiff having a "protuberance on the side of her head" at the time he first examined her, and he said he did. Immediately after

the examination of the plaintiff's family physician, the plaintiff resumed the stand and was asked a further question by counsel for the defendant with reference to her weight, and thereupon counsel for the plaintiff asked several questions on redirect examination, the last of which was "That part of the head was this bump on, that you described?", to which she answered: "Over the right temple."

A young woman who had given the plaintiff some massage a few days after the injury, stated that at the time she first attempted to treat her, "she was all bruised up, all over her body"; that most of the bruises were on the lower part of her back and between her shoulders, and that she had "a very big lump over her right eye in her head." She was asked to indicate where this bump was located and she pointed to a spot over the right temple.

The plaintiff's mother testified as to the bruises on the plaintiff's back and stated that her hip was skinned and her chest, and also that "she had a very large lump on top of her head, and the lower part of her jaw, which was as big as an egg." She testified that her daughter had never had any of these spells previously but that she had experienced many since the injury. She described these spells, their extent and their duration.

It appears from the record that in 1919, sometime after the occurrence in question a physician had examined the plaintiff, representing the defendant and at the request of the defendant's counsel. He testified that at the time of his examination the plaintiff told him that she was suffering from a nervous condition; that she had been in an accident and

that she was then "suffering from a condition that, as she explained it, when she became exhausted, she would become hepatic inside, and she would have an excessive flow of saliva from her mouth and some nausea, and she also stated that she had some pains in her back"; that these were all the symptoms she gave at that time; that he found her pulse and heart normal and there "was no pathology that I could find." He was asked whether the plaintiff told him of any spells and he replied that the only condition she told him about was that she became exhausted and then she became nauseated, and she told him "nothing of a sinking spell", nor did she describe any contraction of the muscles of the hands or arms.

While it would appear from this testimony that in connection with occurrence in question the plaintiff experienced some brain injury which resulted in what have been referred to as spells and while that condition was a serious one, and might warrant the amount of damages assessed by the jury if it had been shown that the condition was a permanent one, the evidence does not establish that fact. When asked his opinion as to the permanency of this condition, by counsel for the plaintiff, her family physician said that the condition might be permanent. These spells had occurred with increasingly less frequency during the time which elapsed between the time of the injury and the trial of the case, and although the plaintiff experienced them every few days at first, and once a week, or two or three times a month, during the first year, she testified that they were less frequent during the second year, and that she only had three during the third year, and at the time of the trial she had not had one for about three months, and a half.

On the record we regard the damages as excessive. The judgment of the trial court is therefore affirmed on condition that the plaintiff enter a remittitur of $3,000.00 in this court within 10 days. If such remittitur is not entered the judgment of the trial court will be reversed and the cause remanded to that court for a new trial.

In his brief filed in this court, counsel for the plaintiff contends that the bill of exceptions should be stricken from the record and the cause dismissed. After filing his brief counsel for the plaintiff made his motion to that effect, in this court and the motion was denied. We will, therefore, not consider the matter further at this time.

JUDGMENT AFFIRMED ON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

483 - 27441

ANNA AHERN, et al,
Appellees,

v.

M. D. BEAUDRO, et al,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Filed Feb. 16,'23.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a forcible entry and detainer proceeding, in which the trial court entered judgment for the plaintiffs, to reverse which the defendants have perfected this appeal.

The lease covering the premises occupied by the defendants, as it was introduced in evidence, names "Owen and Anna Ahern" as parties of the first part. The signatures on the lease, other than those of the defendants, are "New Gault Hotel Company" and "Arthur Ahern". The lease was made on July 1, 1920, and covered the period from that date to June 30, 1921. Apparently during that period of time Owen Ahern died and his eldest son Arthur Ahern became the administrator of his estate. How it came about that the lease, reciting Owen and Anna Ahern as parties of the first part, was executed in the name of the New Gault Hotel Company and Arthur Ahern, does not appear except that the evidence does show that Arthur Ahern always collected the rent of the premises and Anna Ahern testified that "he attends to all the business transactions connected with it." It would seem to be established that Arthur Ahern was the duly qualified agent

Filed Feb. 16,'23

MR. FRANCISKIND [illegible] the claims of the [illegible].

This was a forcible and, and indeed persuasive, in which the trial court entered judgment for the plaintiff, in reviewing which the defendants have centered this appeal.

The issue covering the premises occupied by the two Fanburg, as it was introduced in evidence, means "Ham and Anne Alnern" as parties of the first part. The defendants on the issue, other than those of the defendants, are "New Hyatt Total Company" and "Arthur Alnern". The lease was dated July 1, 1920, and covered the period from that date to June 30, 1921. Apparently during that period of time Ham Alnern died and his widow, Anne Alnern became the administratrix of his estate. Her it came about that the issue, the action then and Anne Alnern as parties of the first part, the assented in the name of the New Hyatt Total Company and Arthur Alnern, does not appear except that the evidence does show that Arthur Alnern already relinquished the rest of the premises and Anne Alnern certified that "he attends to all the business transactions connected with it." It would seem to be established that Arthur Alnern was the duly qualified legal

of the parties of the first part named in the lease.

One of the defendants testified that early in June 1921, he had a talk with Anna Ahern and her son Arthur, in which they agreed to renew the lease, and that there was another similar talk about the middle of that month, and that still later in June the witness had a talk with Arthur Ahern on the premises in question, in which the latter agreed that the defendants might remain in the premises until January 1, 1922, at an increase in rental of $100.00 per month, but that he could not renew their lease for a year. The witness testified that this conversation was had in the presence of three others, and two of them testified in this case, in corroboration of this witness, as to the agreement on the part of Arthur Ahern, as above set forth.

Arthur Ahern did not take the stand and deny the conversation testified to. It further appears in the evidence that on the first or second of July, 1921, the defendants tendered the rental for that month at the increased rate to Arthur Ahern but he declined it. They again tendered it in the trial court and again it was declined. On the 8th of July the proceedings at bar were instituted.

We are of the opinion that the evidence referred to established the fact that Arthur Ahern was the duly authorized agent of the lessors of this property and that as such, he agreed with the defendants that they might continue in possession of the premises from the date of the expiration of the written lease, on June 30, 1921, until January 1, 1922.

It further appears from the record that near the close of the hearing of this case, counsel for the plaintiffs advised the court that "The fact is that the plaintiffs have

of the portion of the first part named in the issue.

One of the defendants testified that early in June 1921, in the presence of his wife and the plaintiff, in which they agreed to renew the lease, and that there was another meeting with them in the middle of that month, and that still later in June the witness had a talk with plaintiff about the premises in question, in which the latter agreed that the defendants might remain in the premises until January 1, 1922. It is admitted by the plaintiff that he did not make their lease for a year. The witness testified that this conversation was had in the presence of three strangers, and two of them testified in this case, in corroboration of this witness, as to the agreement on the part of rather them, as above set forth.

Arthur Green did not take the stand and deny the conversation testified to. In fact no witness in the instant case on the first or second of July, 1921, the attorneys mentioned the legal ten days notice to the tenants with a view to have the plaintiff [illegible]. They only testified it is the trial court and quite it was doubtful. On the 6th of July the proceedings at law were instituted.

We are of the opinion that the evidence referred to establishes the fact that Arthur Green was the duly authorized agent of the lessors of this property, and as such, in error, by express and the defendants that they could rightfully [illegible] the premises from the date of the expiration of the existing lease, or June 30, 1921, until January 1, 1922.

It [illegible] appears from the record that the [illegible] of the tenant of this case, except for the liability

rented these premises along in June. The tenants are sweating around to get in there." That being the situation, admitted to exist by counsel for the plaintiffs, they were not the proper parties to bring forcible entry and detainer proceedings, as the new tenants were the ones then entitled to the possession of the premises, assuming that the defendants were not entitled to possession. That fact was immediately called to the attention of the court by counsel for the defendants, but beyond that, nothing was done about it in the trial court.

In our opinion, the evidence in the record does not establish that at the time the proceedings were brought, the plaintiffs were entitled to possession of the premises involved and the finding should have been for the defendants.

The judgment of the Municipal Court will, therefore, be reversed.

REVERSED.

TAYLOR AND O'CONNOR, JJ, CONCUR.

28301

JOHN BAGDONAS, STANLEY BAGDONAS, GEORGE PAUKSTIS, GEORGE BENDIK, JOSEPH MISKEVICH and WALDAS NAFNAS, Appellees,	INTERLOCUTORY APPEAL, CIRCUIT COURT, COOK COUNTY.
v.	
LIBERTY LAND & INVESTMENT COMPANY, a corporation, MICHAEL ROZENSKI and JOHN SINKUS, Appellants.	228 I.A. 082

Filed Feb. 16,'23.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendants from an interlocutory order entered in the Circuit Court of Cook County, appointing a receiver of the property of the defendant corporation *pendente lite* and without notice, on the bill filed by the complainants.

The complainants are stockholders in the defendant company, one of them holding five shares; three of them, ten shares each; another thirty-five shares and another seventy-five shares. The parties defendant are the corporation and certain individuals who are alleged to have been directors of the company and to have constituted a majority of that board at the time of the grievances complained of in the bill.

The defendant company was incorporated in 1918, with and authorized capital stock of $200,000.00 divided into twenty thousand shares with a par value of $10.00 each. The bill alleges that subsequent to the incorporation of the company, capital stock to the extent of $85,000.00 was sold and that amount was

Filed Feb. 16, '23.

paid into the company, and that after such amount was so paid into the company, the defendants conspired to misappropriate the funds and assets of the company to their own use; that of the $85,000.00 so paid into the company, only $15,000.00 was properly invested, and that the defendants fraudulently misappropriated the balance of $70,000.00 and over, to their own use, and have since said time retained said sum, and still retain it. The bill further alleges that the complainants have demanded an accounting of the defendants and that the latter have refused to account for the disposition of these funds, and the complainants alleged that they are informed and believe, and therefore charge, that the defendants have made false entries in the company's books, for the purpose of making it appear that the company owes sums which it, in fact, does not lawfully owe, to the end that the funds of the company may be misappropriated by the defendants, through their confederates, to their own use.

It is further alleged in the bill, thatthe complainants are informed and believe, and therefore charge, that the defendants are planning to file a fictitious voluntary bankruptcy proceeding in the United States District Court, to the end that the company may be dissolved and the defendants and their confederates be allowed certain fictitious claims against the company, and that the defendants will carry out this plan unless restrained therefrom by a writ of injunction, and unless a receiver is immediately appointed, without notice, to take charge of, preserve and protect the assets of the company, under the order of the court. There are some further allegations in the bill which need not be noted here. The bill does not allege that the defendant corporation is insolvent nor that it is in

still into the company, and that after such amounts had so paid from the company, the directors thereafter in misappropriating the funds and assets of the company to their own use, that of the $18,000.00 so paid into the company, $12,000.00 was actually interested, and that the defendants fraudulently misappropriated the balance of $6,000.00 and more, to their own use, and have since made false statements and oath, and still retain it. The bill further alleges that the complainants have discovered on examining of the defendants and that the defendants have refused to account for the disposition of these funds, and the complainants allege that they are informed and believe and therefore charge, that the defendants have made false representations to the company's books, for the purpose of showing it appear that the money came from other sources, in fact, it is not impossible even to the end that the funds of the company may be misappropriated by the defendants, without their participation, to their own use.

It is further alleged in the bill, that the complainants are informed and believe, and therefore charge, that the defendants are planning to file a fraudulent claim against the company, and that the defendants will attempt to have the company and that the defendants may be induced to discharge and the defendants may have their confederates be elected certain fraudulent claims against the company, and that the defendants will carry out this plan unless restrained therefrom by a writ of injunction, and unless a receiver is immediately appointed, without notice, to take charge of, protect and preserve the assets of the company, which are subject to the court. There are some further allegations in the bill which need not be called for. The bill then has the prayer

danger of becoming so, nor that the defendants, other than the corporation, are financially irresponsible. The record does not show that any restraining order was entered, nor any injunction writ issued, but an order was entered, without notice, appointing a receiver as prayed for in the bill, to reverse which this appeal has been perfected.

In our opinion, the appointment of a receiver, ex parte, on the allegations of this bill, was error. To appoint a receiver of a solvent going concern, without notice, is a serious matter. It should only be done under allegations of fact showing the existence of the gravest emergency. To warrant such an appointment, without notice, upon the filing of a bill, "it must be clearly shown that the delay which would result from giving notice, would defeat the rights of the complainants, or would result in great injury to them." High on Receivers (3d. ed.) Sec. 111 - 113; Consolidated Mining & Milling Co. v. Locher, 96 Ill. App. 148. English v. The People, 90 Ill. App. 54; Nusbaum v. Locke, 53 Ill. App. 242; Becker v. Defebaugh, 66 Ill. App. 504; Suburban Cons. Co. v. Naugle, 70 Ill. App. 384; Bancroft v. Yaltman, 213 Ill. App. 647. Where a minority interest in a corporation seeks the appointment of a receiver on the ground of fraud and mismanagement, the grounds constituting such fraud and mismanagement must be distinctly set forth. It is not enough to allege that the officers of the corporation have appropriated money of the corporation, to their own use, the details of which the complainants are unable to state. A corporation will be placed in the hands of a receiver for the misconduct of its officers or directors only when such action is necessary to preserve the property rights of creditors or stockholders. The mere misconduct of officers of a corporation is not sufficient ground

danger of hamstringing so, nor that the defendants, either been the [illegible]s, are financially irresponsible. The courts have not shown that any restraining order was entered, nor any injunction will issue. It is also not entirely clearly [illegible] assessing a penalty on filing the so the bill, in [illegible] this appeal has been perfected.

In our ruling, the dismissal of a judgment, on motion on the allegations of this bill, was error. To appeals a review of a motion filing motion, without notice, is a serious matter. It should only be done under allegations of [illegible] the minimum of the present emergency. To warrant such an injunction, without notice, upon the filing of a bill, "it must be clearly [illegible] that the filing of a bill, upon filing motion, would defeat the rights of the complainants, or would result in great injury to them." Bill on interim (Ga. Ed.) [illegible] Bill - Bill; [illegible] v. [illegible], 40 [illegible] 190. [illegible] v. [illegible], 37 [illegible]; [illegible] v. [illegible], 62 [illegible] 1040; [illegible] v. [illegible], 62 [illegible] 1040; [illegible] v. [illegible], 77 [illegible] 1040; [illegible] v. [illegible], 111 [illegible] 1040. [illegible] a minority interest in a corporation under the supervision of a receiver on the ground of fraud and mismanagement, the receiver complaining such fraud and mismanagement must be distinctly set forth. It is not enough to allege that the officers of the corporation have appropriated money of the corporation, in their own use, the details of which the complainants are unable to state. A corporation will be given in the name of a receiver for the benefit of its officers or directors only when such action is necessary to preserve the property right of stockholders or stockholders. The mere

for the appointment of a receiver for a court of equity may enjoin the misconduct of even remove the officers or directors involved, and in other ways preserve the rights of the parties. Moe et al v. Royal Life Ins. Co. 198 Ill. App. 309.

In the case at bar the complainants allege that subsequent to the formation of the defendant company in 1918, some $85,000.00 was paid in to the company and thereafter the defendants conspired to misappropriate that money to their own use. How long after the money was paid in to the company, such conspiracy was formed or attempted to be carried out, is not stated. For all that is alleged in this bill, it may have been two or three years prior to the filing of the bill. As was said in Vienna Bakery Co. v. Heissler, 50 Ill. App. 404, "Courts do not appoint receivers as a punishment for past dereliction, nor because of past dangers. Receivers are appointed because of present conditions and well-founded apprehensions as to the future." The only allegations to be found in this bill having to do with present conditions or apprehensions as to the future, are stated on information and belief. It is alleged that the defendants have made or caused to be made, false entries in the corporation records and books, to the end that its funds "might be misappropriated by them", and that the defendants are planning to file a fictitious bankruptcy proceeding, to the end that the company may be dissolved and the defendants may procure the allowance of their fictitious claims. Such allegations do not warrant the appointment of a receiver, without notice, of a concern, which, so far as any allegations in the bill are concerned, is a solvent going company. Assuming all allegations in the bill to be true, as we do for the purpose of this decision, all rights of the complainants would be adequately

preserved by a proper restraining order. If the bill had alleged facts showing the defendants to be in possession of a controlling interest in the company, and engaged in a process of looting the company, a different case would be made out.

To put the property of a solvent, going concern into the hands of a receiver, especially without notice, is not to be tolerated, except as a last resort where no other course can be found which will meet the situation and preserve the rights of the parties. Independent Brewing Assn. v. Klein, 138 Ill. App. 234; Moe et al v. Royal Life Ins. Co. supra.

The facts alleged in this bill do not make out such a case. The order appealed from is, therefore, reversed.

ORDER REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

461 - 27419

F. W. DEBS, formerly doing business under the name and style of CARLOAD FEED & GRAIN EXCHANGE, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
C. W. SVENDSEN, doing business under the name and style of MID-WEST OIL & SUPPLY COMPANY, Appellant.	

Filed Feb. 16, '23.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant and recovered a judgment. We have carefully examined the abstract and brief of the defendant, plaintiff having filed no brief in this court, and are given such little information in reference to the case that we have not been able to form any intelligent opinion as to the merits of the case, nor whether it has been decided properly. It is the duty of a person bringing a case to this court to point out what errors he contends were committed by the trial judge to enable us to pass upon them. This, counsel for defendant has failed to do, and, of course, in these circumstances we will not disturb the judgment.

The only information we are given in the abstract as to what plaintiff's suit is based on is: "Statement of claim," and the only information as to the nature of the defense is: "Affidavit of merits." The abstract of the common law record is:

* * * * * * * * * *

Statement of claim.

Appearance of defendant.

Affidavit of merits.

Set-off.

Order of court, affidavit of merits to set-off in ten days.

Plaintiff's affidavit of merits to defendant's set-off.

* * * * * * * * * * *

Court overruling motion of plaintiff to strike defendant's affidavit of merits and set-off from files.

Trial of the case by the court.

Judgment of the court against the defendant, C. W. Svendsen, and prayer for an appeal by the defendant."

Then follows the approval of the appeal bond, etc. While we do not require that the common law record be scientifically abstracted where there is no question of the sufficiency of the pleadings involved, yet we think that sufficient should be set out to inform the court of the nature of plaintiff's claim and of the defendant's defense. In the evidence, as abstracted, references are made to a great many exhibits, but we are given no information as to what most of them are. We are finally informed in the abstract that the court "rendered judgment for the plaintiff for $120.00."

The only statement of the case in the brief filed is: "This is an appeal by the defendant in a suit brought by plaintiff in the Municipal Court of the City of Chicago, which suit was tried by the court and a finding and judgment against the defend-

* * * * * * * * *

Statement of claim.

Appearance of defendant.

Affidavit of merits.

Order.

Order of court, affidavit of merits on behalf

in the case.

Plaintiff's affidavit of service on defendant's

app-ntt.

* * * * * * * * *

Court overruling motion of plaintiff to strike

defendant's affidavit of merits and refusal

from filer.

Trial of the case by the court.

Entry of new trial against the defendant, T. T.

Bowman, and judgment for: on appeal by the defendant.

Then follows the argument of the counsel found, etc.

While we do not remember that the opinion has ever been so authoritatively enunciated where there is no question of the sufficiency of the affidavit itself, yet we think that authority should be not so to inform the court of the merits of plaintiff's claim and of the defendant's defense. In the minutes, or mentioned, reference are made to a prior court affidavit, but we are given no information as to what part of that are. In our limited informed by the abstract that the court rendered judgment for the plaintiff for $180.00."

The only statement of the case in the brief filed is:

"This is an appeal by the defendant in a suit brought by plaintiff in the municipal court of the City of Chicago, which suit was filed by the entering of a "Plaintiff's affidavit of merits" against the

ant in which the plaintiff alleged loss on a contract to purchase certain quantities of ground mill feed and in which the defendant filed a set-off alleging losses by reason of plaintiff's failure to take and pay for such ground mill feed." Then follows a point of law that this court will set aside a finding where it is clearly and manifestly against the weight of the evidence, and authorities to sustain this are cited. Following this is counsel's argument which is not at all understandable. The only way this court could determine whether the case was properly decided by the trial judge would be to examine the entire record. That is not the function of this court, but it is the duty of the party bringing the case here to point out what he claims are the errors of the trial judge, and having failed to do so, we are not at liberty to disturb the judgment.

We have no objection to reading the record in this or any other case where it is necessary to do so to understand a point made in the brief, but if we read the record in this case we would still be in the dark as to the points made by the defendant.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

and in which the plaintiff stepped into an a contract in pursuance certain questions of ground mill fees - one in which the defendant filed a set-off claiming damage by reason of plaintiff's failure to take and pay for such ground mill feed.

Then follows a plea of the same nature with not notice a finding short is in nearly and manifestly against the weight of the evidence, and authorities to support this are cited.

Following this is counsel's argument which is not as all unanswerable. The only key this court could determine whether the case was improperly decided by the trial judge would be to examine the entire record. This is not the function of this court, but it is the duty of the party bringing the case here to point out what he claims are the errors of the trial judge, and having failed to do so, we are not at liberty to disturb the judgment.

Assume an objection to reading the record in this or any other case where it is necessary to do so is untenable a point made for the first, but if we read the record in this case we think it will be in the same as in the opinion held by the lower court.

The judgment of the lower court must be affirmed.

AFFIRMED.

DENNIS, J.J. and Fulton, J. concur.

467 - 27425

ROBERT BRUTON,
Appellee,

v.

MANDEL BROTHERS,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

223 I.A. 682 3

Filed Feb. 16,'23.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by him by reason of being knocked down and run over by one of the defendant's electric trucks. There was a verdict and judgment in plaintiff's favor for $4500.00, to reverse which the defendant prosecutes this appeal.

The undisputed facts, as shown by the evidence, are that on December 4, 1918, the plaintiff, who was then about 19 years old was assisting another man in loading a bookcase onto a Ford truck. The truck was standing headed south near the west curb of Wabash avenue just south of 13th street. Plaintiff and the other man were standing behind the truck facing south. They had just lifted the bookcase into the truck when a heavy electric truck which was being driven by an agent of the defendant south in Wabash avenue struck the plaintiff, knocked him down and ran over his legs. The driver of the truck at the time in question was inexperienced. He had just that morning taken an examination for a chauffeur's license, and was on his first trip, an experienced driver named Bartlett being seated beside him. The truck had left Mandel

Filed Feb. 16,'23.

Brothers store on Wabash and Madison street and was driven south in Wabash avenue by Bartlett, who was instructing the new driver, Malone. When they reached 12th street they changed places and Malone took the wheel. The roadway of Wabash avenue between 12th and 13th streets seems to have been in a bad state of repair and full of ruts. As the truck was just north of 13th street the driver turned it toward the west curb to avoid a rut. He then turned toward the southeast to pass around the Ford truck but in doing so the right front wheel of the electric truck struck plaintiff and knocked him down. The evidence of these facts is undisputed. There is some discrepancy in the evidence as to where plaintiff was standing but all the evidence is to the effect that he was near the northeast corner of the Ford truck and between him and the west curb was the man who was assisting in loading the bookcase. The only dispute in the evidence as to how the accident happened was that Bartlett testified that as the electric truck was about to pass the Ford truck, plaintiff stepped back and was struck. This was denied but we think that which ever version is true is immaterial.

1. The defendant strenuously contends that the verdict and judgment of the court finding it guilty of negligence is against the manifest weight of the evidence. This argument is based on the theory that plaintiff alone was negligent in stepping back just before he was struck, and for this reason the judgment should be reversed. In this contention there is no merit. The liability in this case is clear and the facts upon which it is based are undisputed. Even if we assume that plaintiff was injured by reason of the fact that he stepped back as a witness for the defendant testified, it would clearly be a question of fact for the jury whether, in these cir-

Dwithers stood on Tabaka and Indiana street and was driving south in Tabaka driven by Martlett, who was instructing the new driver, Milner. That day plaintiff had driven from Oswego place and Tabaka took the wheel. The roadway of Tabaka avenue between 12th and 13th streets seems to have been in a bad state of repair and full of ruts. At the bump the last north of 12th street the driver turned it toward the west curb to avoid a rut. He then turned toward the southwest to pass around the ford truck but in doing so the right front wheel of the electric truck struck plaintiff and knocked him down. The evidence of these facts is undisputed. There is some discrepancy in the evidence as to where plaintiff was standing but all the evidence is to the effect that he was near the northwest corner of the ford truck and between him and the curb was the man who was assisting in loading the bookcase. The only dispute in the evidence as to how the accident happened was that Martlett testified that as the electric truck was about to pass the ford truck, plaintiff stepped back and was struck. This was denied but we think that claim over versions in this is immaterial.

I.The defendant strenuously contends that the verdict and judgment of the court finding its policy of negligence in regards the manifest weight of the evidence. This argument is based on the theory that plaintiff alone was negligent in stepping back into the street, and in this instance the judgment should be reversed. In this contention there is no merit. The liability in this case is clear and the facts upon which it is based are undisputed. Even if we assume that plaintiff was injured by reason of the fact that he stepped back as a witness for the defendant testified, it would clear

cumstances, the defendant was not liable, and we think that the jury were fully warranted in finding as they did. So far as the evidence shows there was no other traffic on the street that interfered with the view of the situation by the driver of defendant's truck. He testified that he saw plaintiff standing behind the Ford truck when defendant's truck was 50 feet north of the Ford. He saw the plaintiff with his back turned in the act of loading the bookcase. There is no evidence that any warning was given of the approach of the electric truck and the driver of that truck might reasonably have assumed that the plaintiff might move around a step or so in the course of doing that in which he was then engaged. We think it clear that on defendant's own version of the situation it would be liable and that the finding of the jury was the only finding that could reasonably be returned on the evidence. In this connection, the defendant contends that the only reason that can be assigned for the verdict of the jury in favor of the plaintiff is that the court permitted the witness Wright, who was driving south in Wabash avenue at the time in question about 50 feet behind defendant's truck, to testify that from his observation of the manner in which defendant's truck was being operated, the driver was incompetent. Of course, it was error to admit such testimony, but the error, in our opinion, could have had no effect on the result, because the evidence of liability was clear.

2. Complaint is also made that the argument to the jury of counsel for plaintiff was prejudicial and the judgment should be reversed on that account. The argument complained of was: "How many hundreds of people were killed in Chicago last year? How many were killed? To answer the question, if there

[illegible] mountainous, the defendant was not liable, and so taking that the jury was fully warranted in finding as they did. On the [illegible] evidence alone, there was no [illegible] liability on his [illegible] interfered with the view of the mishaps by the error of defendant's truck. It testified that he was physically [illegible] ing behind the [illegible] truck when defendant's truck was 50 feet north of the Ford. He saw the plaintiff with his back turned in the act of loading the footman. There is no evidence that any warning was given of the approach of the electric truck and the driver of that truck might reasonably have assumed that the plaintiff might move around a step or so in the course of doing that in which he was then engaged. To think it clear that on defendant's own version of the situation it would be liable was that the finding of the jury was the only finding that could reasonably be rendered on the evidence. In this connection, the defendant contends that the only reason that can be assigned for the verdict of the jury in favor of the plaintiff is that the court permitted the witness [illegible], who was driving south in Palmer avenue at the time in question about 50 feet behind defendant's truck, to testify that from his observation of the manner in which defendant's truck was being operated, the driver was inexperienced. Of course, it was error to admit such testimony, but the error, in our view, could have had no effect on the result, because the evidence of liability was clear.

2. Complaint is also made that the arguments to the jury of counsel for plaintiff was improperly and the judgment should be reversed on that account. The argument complained of was: "How many hundreds of people were killed in Chicago last year? Not one was killed in Chicago, if that [illegible]

were 599, it is only by God's mercy that 600 were not killed, and this young man would be in his grave, and you would have had an executor suing for his estate instead of this young man. Is there any way in which yourse a jury can put a stop to the killing of hundreds of people in the City of Chicago? You have got a chance to help stop that criminal process here in this city. I do not know how many trucks Mandel Brothers have upon the streets of Chicago, but the evidence shows that the superintendent sent this novice out to drive a truck on Wabash avenue that he had never driven before. Is there any way that you can get word to Mandel Brothers to stop that sort of business, and not kill men here upon the streets." Upon objection the court said: "I think the argument is a little extreme. The jury will disregard that part of it." Counsel for plaintiff: "I will withdraw that part of it." Nothing need be said to show that this argument was highly improper, and if the case were a close one on the merits, we would not hesitate to reverse it on account of the argument, but what was said by counsel was in some measure a reply to the argument of counsel for the defendant, who said: "How many hundreds of people have been killed in Chicago the last year, due to their carelessness in crossing the street any place they saw fit?" It was in reply to this that the argument complained of was made. Counsel for defendant further argued: "Pedestrians gallop and cavort around the streets every day right in front of automobiles. * * * You cannot put yourself in a position of danger and expect your neighbor to take care of you. He will crush you; he will kill you."

In view of the argument made by counsel for both sides, and in view of the fact that the liability is clear from the evidence, which is substantially undisputed, we would not be justi-

were dead, it is only by God's mercy that we were not killed, and that young man would be in his grave, and you would have had no excuse saving for his relatives instead of this young man. Is there any way in which you can get a step in the utility of humanity in the city of Chicago? Can there not be a chance to help stop that drinking process here in this city. I do not know how many strong minded men there have been the objects of Chicago, but the evidence shows that the supertendent took this motion out to drive a truck on Sabbath because that he had never driven before. Is there any way that you can get more to social duties in stop that sort of business, and not kill men here upon the streets." Then objection the so-it said: "I think the argument is a little serious. The jury will disregard that part of it." Counsel for plaintiff: "I will withdraw that part of it." Nothing need be said to show that this argument was highly improper, and if the case were a close one on the merits, we would not hesitate to reverse it on account of the argument, but what was said in reply was in some measure a reply to the argument of counsel for the defendant, who said: "How many hundreds of people have been killed in Chicago the last year, due to their carelessness in crossing the street and place they are 1127." It was in reply to this that the argument complained of was made. Counsel for defendant further argued: "Pedestrians walking and cannot around the streets every day right in front of automobiles. * * * You cannot put yourself in a position of danger and suspect your neighbor to take care of you. He will when you; he will kill you."

In view of the argument made by counsel for both sides, and in view of the fact that the liability is clear from the evi-

fied in disturbing the judgment on account of the argument.

3. Defendant further contends that the verdict is excessive. The evidence shows that plaintiff was injured December 4, 1918; that he was rendered unconscious at the time; that he was taken to an hospital where he received first aid and that on the next day he was removed to his sister's home where he was treated by his family physician. This physician testified that upon examination he found that the left ankle was bruised and swollen, and the injury was then bandaged; that he found the left knee also bruised, and some slight injury to the right leg and scalp. There were also some bruises on the back of the head. There was no cast placed upon the ankle. He further testified that he saw plaintiff about five times, the last time being February 18, 1919, at which time the plaintiff was using a crutch and a cane, and that at that time his opinion was that the ankle had not entirely healed; that he made a slight examination of the plaintiff shortly before the trial when he was subpoenaed as a witness and he was of the opinion that the ankle had done fairly well "but it might not be as good as it was in the first place."; that on his last examination the plaintiff limped some. He further gave as his opinion that if the plaintiff suffered pain at the time of the trial it would have been caused by excessive walking or dancing or the like. The plaintiff testified that after his injury he was laid up for three or four months, and then went to work for a taxicab company for about two weeks; that he then left this place of employment, but does not give any reason for doing so. He then went to a Mrs. Lee's home; that he had to use crutches and he had pains in his head, stomach and ankle; that he stayed there about two months and then went to a Mrs. Cook's home where he stayed for three or four months;

ried in disturbing the judgment or answers of the arguments.

2. Defendant further maintains that the verdict is excessive. The evidence tends that plaintiff was injured December 4, 1919; that he was remanded immediately at the time; that he was taken to an hospital where he remained three days and that on the next day he was removed to his mother's home where he was treated by his family physician. This physician testified that upon examination he found that the left ankle was bruised and swollen, and the injury was then managed; that he found the left knee also bruised, and some slight injury to the right leg and ankle. There was also some bruises on the back of the head. There was no cast placed upon the ankle. He further testified that he saw plaintiff every five days, the last time being January 14, 1919, at which time the plaintiff was using a crutch and a cane, and that at that time his opinion was that the ankle had not entirely healed; that he made a medical examination of the plaintiff shortly before the trial when he was represented as a cripple and in view of the opinion that the ankle had some injury yet "but it might not be as good as it was in the first place."; that on his last examination he plaintiff limped some. He further gave as his opinion that if the plaintiff suffered pain at the time of the trial it might have been caused by excessive walking or dancing or the like. The plaintiff testified that after his injury he was laid up for three or four months, and then went to work for a tailors company for about two weeks; then he then left this place of employment, but does not have any reason for doing so. He then went to a Mrs. Lewis house; that he had to use crutches and he had pains in his head, ankles and nerves; that he stayed there about two months and then went

that while there he again drove a taxicab, and that driving the cab caused his ankle to pain him, and that he had pains in his stomach and head and was compelled to give up this work; that there was a bandage around his ankle for almost a year after he was injured. He then testified to various other jobs he had driving taxicabs, until shortly before the trial he conducted a dancing school where he danced for short periods of time but was unable to do so without pain in his ankle. He further testified that he was not working at the time of the injury, but shortly before that time had been doing war work earning from $7.50 to $12.00 per night; that after the injury he went back to the same employment and worked for 50¢ an hour, the armistice having been signed in the interim. He further testified that he was treated by several doctors and they prescribed medicines for him. He repeatedly testified that his head, stomach and ankle troubled him. There is no evidence in the record that the stomach trouble was the result of the accident nor that the pains in his head were caused by it, except that his head was injured at the time he was run over, but no doctor was asked, nor did any witness testify that in his opinion the pains he was experiencing long after were caused by the accident. The family physician who treated him within a day or two after the injury makes no mention of doing anything for him except treating his ankle and limbs. There is other evidence in the record showing the result of an X-ray picture, but we think it would serve no useful purpose to analyze the evidence further. We are not at all satisfied with the evidence as to the extent of plaintiff's injuries, and upon a consideration of all the evidence in the record, we are of the opinion that the verdict is excessive.

If the plaintiff will remit $1,000.00 within ten days the judgment will be affirmed, otherwise, reversed and the cause remanded.

Plaintiff will be required to pay 25% of the defendant's costs in this court.

AFFIRMED IF $1,000.00 REMITTED WITHIN TEN DAYS; OTHERWISE, REVERSED AND THE CAUSE REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

491 - 27486

JULIUS C. TRIEBES, Appellant,	APPEAL FROM
v.	CIRCUIT COURT, COOK COUNTY.
CHARLES H. FRAZIER, JOSEPH P. GEARY, and ALEXANDER J. JOHNSON, as Civil Service Commissioners of the City of Chicago, and THOMAS O'CONNOR, as Chief of the Fire Department of the City of Chicago, Appellees.	

Filed Feb. 16'23.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Julius C. Triebes filed his petition in the Circuit Court of Cook County praying for a writ of mandamus directed to the three civil service commissioners and to the Chief of the Fire Department of the City of Chicago commanding the commissioners forthwith to certify the name of the petitioner to the chief of the Fire Department as being eligible for promotion to a lieutenancy in the Fire Department, and directing and commanding the chief of the department to promote the petitioner accordingly, and for such further order as justice may require.

The facts and issues involved in this case are similar to those we considered in the case of O'Brien v. Frazier, et al. Gen. No. 27485, in which we have this day filed an opinion, and for the reasons therein stated the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

492 - 27487

JAMES F. GUNNER, Appellant, v. CHARLES E. FRAZIER, JOSEPH E. GRARY, and ALEXANDER J. JOHNSON AS Civil Service Commissioners of the City of Chicago, and THOMAS O'CONNOR, as Chief of the Fire Department of the City of Chicago, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Filed Feb.16,'23.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

James F. Gunner filed his petition in the Circuit Court of Cook County praying for a writ of mandamus directed to the three civil service commissioners and to the chief of the Fire Department of the City of Chicago commanding the commissioners forthwith to certify the name of the petitioner to the chief of the Fire Department as being eligible for promotion to a lieutenancy in the Fire Department, and directing and commanding the chief of the department to promote the petitioner accordingly, and for such further order as justice may require.

The facts and issues involved in this case are the same as those we considered in the case of O'Brien v. Frazier, et al Gen. No. 27485, in which we have this day filed an opinion, and for the reasons therein stated the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. and TAYLOR, J. CONCUR.

Filed Feb.16,'26.

Mr. JUSTICE O'CONNOR delivered the opinion of the court.

James H. Gunner filed his petition in the Circuit Court of Cook County praying for a writ of mandamus directed to the three civil service commissioners and to the chief of the Fire Department of the City of Chicago commanding the commissioners forthwith to certify the name of the petitioner in the order of the Fire Department as being eligible for promotion to a lieutenancy in the Fire Department, and directing and commanding the chief of the department to promote the petitioner accordingly, and for such further order as justice may require.

The facts and issues involved in this case are the same as those so considered in the case of O'Brien v. Crowley, ante, No. 17485, in which we have this day filed an opinion, and for the reasons therein stated the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to overrule the demurrer.

REVERSED AND REMANDED, WITH DIRECTIONS.

2782
137-27831

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., WILLIAM E. BALDWIN,
Appellant,

-vs-

CHARLES E. FRAZIER, JOSEPH P. GEARY, and CARLOS AMES, as Civil Service Commissioners of the City of Chicago, CHARLES FITZMORRIS, as General Superintendent of Police of the Police Department of the City of Chicago, CITY OF CHICAGO, a municipal corporation, MICHAEL J. CRADY, JOHN T. MONTON, THOMAS CONDON, JOHN H. McCARTHY, JOHN J. FARRELL, AXEL O. JENSEN, ANTHONY C. W. SMITH, WILLIAM E. O'CONNOR, THOMAS F. L. O'HARA, JOHN W. BOURKE, and DAVID SCHWARTZ,
Appellees.

Appeal from
Circuit Court,
Cook County.

Filed Feb. 16, '23.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

William E. Baldwin filed his petition praying for a writ of mandamus directed to the three Civil Service Commissioners and the General Superintendent of Police of the City of Chicago, commanding the commissioners forthwith to cancel their eleven certifications of the names of certain persons to the General Superintendent of Police, and to certify to such superintendent the names of not more than three persons from the eligible list for each of the eleven vacancies, and that the superintendent appoint one of such three persons to each of the vacancies. The Civil Service Commissioners, the General Superintendent of Police, the City of Chicago, and the eleven persons whose names had been certified by the Commissioners and who had been appointed to lieutenancies in the Police Department were made defendants. All of them filed general demurrers which were sustained and the petition dismissed, to reverse which this appeal is prosecuted.

So far as it is necessary to state them, the material allegations of the petition are that Baldwin was employed by

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the City of Chicago as a sergeant of police since February 19, 1918; that he was in the classified service of the city; that on November 22, 1919, there was no list of eligibles, prepared by the Civil Service Commission, of persons to fill vacancies as they might occur in the grade of lieutenant in the Police Department of the city; that on that date the commissioners gave notice of a promotional examination for lieutenant of police, wherein it was stated that in grading the persons taking the examination, the following percentages would be allowed: general police duties, thirty per cent; knowledge of the City of Chicago, five per cent; Constitution of the United States, five per cent; knowledge of laws and ordinances, twenty per cent; ascertained merit or efficiency, thirty per cent, and seniority in service, ten per cent; that afterwards Baldwin and others, who were eligible, took such promotional examination on December 8, 1919; that a list of those who successfully passed the examination was made up and posted by the commissioners on November 13, 1920, and that Baldwin's name was second on the list.

The petition further alleges that on December 28, 1920, there was one vacancy in the "office, position or place of employment" of lieutenant of police, and that between that date and October 28, 1921, ten other vacancies occurred, but that the Superintendent of Police did not request the commission to certify names to fill such vacancies, because he "for personal, political or other improper reasons did not desire the certification and appointment of petitioner and other persons whose names appeared on the said eligible list or register" but failed to do so that he might bring about another examination and by changing the percentages to be allowed in such examination for "ascertained merit or efficiency", he could create another eligible list upon which the names of persons "whose political, personal and other

affiliations were satisfactory to him" would be at or near the top of the list; that in pursuance of this illegal purpose the Civil Service Commissioners, in agreement with the General Superintendent of Police, on February 25, 1921, gave notice of another promotional examination to be held for persons desiring promotions to lieutenancies in the Police Department; that it was stated in that notice that in grading the papers of those who took the examinations a weight of fifty per cent for ascertained merit or efficiency would be allowed; that the examination was held March 18, 1921, and on October 28, 1921, the list of those who successfully passed such examination was posted by the commissioners; that the first thirteen names appearing on that list were those certified by the commissioners to the Superintendent of Police, and eleven of them were appointed lieutenants in the Police Department by the Superintendent. The petition further alleges that in order to forestall the possibility of an injunction, between the time when the second list was posted on October 28, 1921, and daylight of the following day, October 29, 1921, the Superintendent of Police notified the Civil Service Commissioners in writing of the existence of eleven vacancies in the position of lieutenant of police and made eleven separate requisitions for eligibles to fill such vacancies; that the commissioners made eleven separate certifications of names from the second list, the first certifying the first three names on the list, the second certifying the second, third and fourth names, and the other certifications in like manner; that the first eleven persons whose names appeared on the list were appointed by the superintendent as lieutenants in the Police Department on October 29, 1921, and were still filling such positions or places of employment; that on November 22, 1921, the petitioner caused a written notice to be served on the Civil Service Commissioners that they cancel the

names so certified from the second list, and certify those whose names appeared on the first list. Notice of this was also served on the Superintendent of Police demanding that he appoint persons whose names should be thus certified from the first list, which demand was refused by the commissioners and the Superintendent of Police.

The defendants contend that the Civil Service Commissioners were authorized by section 8 of the Civil Service Act to hold the second examination and to place the names of those persons passing such examination upon the eligible list which was in existence as a result of the first examination, and thus revise the list of eligibles, and that the petition shows that this was done and that from such revised list the names of thirteen persons who were certified were thus at the head of the list. It is the further position of the defendants that the allegation of the petition to the effect that although there were eleven vacancies in the position of lieutenant in the Police Department no requisition was made by the Superintendent of Police on the Civil Service Commissioners on account of political and personal reasons is a mere conclusion of the pleader and not admitted by the demurrers.

The Civil Service Act, after providing for the classification of offices and places of employment and the conducting of examinations for such employment, in section 8 provides that from such examinations the commission shall prepare a register for each grade or class of position of the persons whose general average is not less that the minimum fixed by the commission, and who are otherwise eligible, "and such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by the

examination, without reference to the priority of time of examination." We are of the opinion that where an examination is held by the Civil Service Commissioners and a sufficient number has not successfully passed such examination, or for any other valid reason, another examination for the same position may be held and one list or register made up from those successfully passing such examination, but that situation is not before us. From the allegations of the petition, which, for the purpose of this opinion, are admitted to be true, it appears that on December 8, 1919, a promotional examination was held and on November 23, 1920, a list or register of those persons who successfully passed the examination and were eligible for promotion to the position of lieutenant in the Police Department, was posted by the commission, and that during the succeeding eleven months eleven vacancies occurred in the rank of lieutenant, but that no requisition was made by the superintendent on the commissioners, because for personal and political reasons the superintendent did not desire any of those persons whose names appeared on the eligible list appointed to fill such vacancies, and that to carry out this purpose another examination was held where different grades were allowed for ascertained merit of efficiency; that a list of persons passing this second examination was posted by the commission on October 28, 1921; that in order to forestall the possibility of an injunction, the superintendent between that time and daylight the next day, made eleven requisitions on the Civil Service Commissioners, and that during the same period the commissioners made eleven certifications to the superintendent, which included the names of the thirteen persons who passed at the head of the list on the second examination. We do not believe that the allegations of the petition in this respect can be considered conclusions of law

pleader, but we think they show sufficient facts to warrant the conclusion that it was the purpose of the commissioners and the superintendent to nullify the provisions of the Civil Service Act. And, as was said in the case of Francis v. Coffin, 282 Ill. 599, (p.610): "To permit such a course of conduct by the judgment of this court would be, in effect, to declare the Civil Service law a deadletter or a law enforcible only at the discretion of said city officers, whose positive duty under the law, is to enforce it, or assist in enforcing it, according to its terms." If the commissioners and the Superintendent of Police were permitted to do the acts charged against them in the petition, then, as said in the Coffin case, the Civil Service law would be a deadletter. We think it clear from the allegations of the petition that what the commissioners and the superintendent did was clearly a violation of the Civil Service law and, therefore, unwarranted.

Second. It is further contended that the rights of the petitioner, if any, are barred by laches because it appears that notice of the second examination was given February 28, 1921, and the examination held March 19, 1921, but that the proceedings here were not begun until November 23, 1921. We think the contention is unsound because it was not until October 28, 1921, that petitioner learned for the first time that other names had been put before his on the eligible list.

Third. It is further said that mandamus will not lie to undo an act which has already been done - that it will not lie to revoke the certifications made by the commission to the superintendent, nor the appointments made by the latter. In the case of Powell v. People, 214 Ill. 475, it was held that a writ of mandamus would issue to compel the Civil Service Commissioners

[illegible], but on their face show conflicting lines to support the conclusion that it was the purpose of the commissioners and the co-plaintiffs to nullify the provisions of the Civil Service Act. But, as was said in the case of Donald v. Griffin, 102 Ill. App. (1.Ed)1: "To permit such a course of conduct by the judgment of this court would be, in effect, to declare the Civil Service Law a dead-letter or a law operative only at the discretion of individual officers. Such practice may make the law, if so enforced it, so stated in referring to, according to the terms." If the commissioners and the Superintendent of Police were permitted to do the acts charged against them in the petition, then, as said in the Griffin case, the Civil Service Law would be a nullity. We think it plain from the allegations of the petition that what the commissioners and the superintendent did was clearly a violation of the Civil Service Law and, therefore, unauthorized.

Fourth. It is further contended that the issuance of the writ, if any, is barred by laches because it appears that notice of the general examination was issued February 1, 1911, and the examination held March 18, 1911, but that the petitions first were not begun until November 13, 1911. We think the question is answered before it was not until October 12, 1911, that petitions leading for the first time that which were not then yet before him on the eligible list.

Fifth. It is further said that mandamus will not lie to take an act which has already been done - that is, will not lie to place the petitioners upon the eligible list by the appointment of the appointee, who has been appointed and by the action. In the case of Tetzel v. Pooley, 254 Ill. 472, it was held that when a writ of mandamus issued to compel the Civil Service Commission

to strike the name of a person from the list of eligibles who had theretofore been certified by them and who had been appointed to a position in the Department of Public Parks in the city, if all parties were properly before the court. In that case the Civil Service Commissioners and the City of Chicago were made defendants and it appeared from the allegations of the petition for mandamus that a list of eligibles pursuant to an examination for appointment "to the office of Chief Sanitary Inspector" of Chicago had been made up by the commissioners; that those on the list, except the petitioner, were ineligible because they were not residents of Illinois; that one of the non-residents, pursuant to a requisition, had been appointed Chief Sanitary Inspector and was discharging the duties of that office. The petition prayed that a writ issue commanding the Civil Service Commissioners to strike the name of the non-residents from the list of eligibles and to cancel their certification to the Commissioner of Health and to certify the name of the petitioner. A demurrer to the answer was sustained. The defendants elected to stand by their answer and the writ was awarded. The judgment of the trial court was reversed on the ground that the person who had been certified and who was occupying the office was not made a party and the cause was remanded, as stated by the court, "to the end that jurisdiction may be acquired over all persons who have a right to be heard before judgment is pronounced." In the instant case all the parties interested were before the court. Under this authority we think the point is not well taken. See also People ex rel. Lally v. Frazier, 319 Ill. App. 334; People ex rel. Laist v. Lauer, 251 Ill. 527.

Fourth. It is also contended that mandamus will not lie to try title to an office, but that quo warranto is the proper remedy; that in the instant case the position of Lieutenant in the Police Department is an office, and, therefore, the court

to strike the name of a person from the list of eligibles who had therefore been certified by them and who had been appointed to a position in the Department of Public Works in the city, if all parties were properly before the court. We find that the Civil Service Commissioners and the City of Cincinnati were both interested and it appeared from the allegations of the petition for mandamus that a list of eligibles prepared by or pertaining to the complainant "in the office of Civil Service Commissioners" in Cincinnati had been made up by the respondentcommissioners that there in the list, regards the petitioner, were individuals having only had qualifications of Illinois; that one of the non-residents, in-deed to a reputation, but being appointed City Engineer-ship and was discharging the duties of that office. The question presented upon a writ issue requesting the Civil Service Commission-ers to strike the name of the representative from the list of eligibles and to commit illegal certification by the Commissioners of Cincinnati and to certify the name of the petitioner. A demurrer to the answer was sustained. The defendants elected to stand by their answer and the petition was dismissed. The plaintiff of the court asked the contention on the ground that the Ohio Civil Service Commission and the officers thereof had been a party to the suit and the Commission, in which by the court, "In the case this purpose may be realized even if petitioner did have a right to be heard before judgment is pronounced." In the matter also all the parties interested were before the court. There this authority on which the point is not well taken. See also Ex parte Lalor 2. Ernston, 22 Ill. App. 1887; Commis. on Ex. Lalor v. Lamar, 101 Ill. 107.

Upon. It is also contended that petitioner fail by his to cry title to an office, but that was decision is, the petition should. Both in the Lowell case the qualifications of Commissioners

did not err in sustaining the demurrer and dismissing the petition. Upon a consideration of the authorities we find that in the opinions of the courts the terms position, office and place of employment are often used interchangeably. In discussing the meaning of these terms the Supreme Court in Paulis v. Coffin, 367 Ill. 599 (supra) said, (p.606): "In many cases it is difficult to determine whether a person is an officer or merely an agent or employee of a municipality. It is even more difficult to lay down any fixed rule to determine the question, in all cases, as to whether a person is an officer or merely an agent or employee of a municipality. * * * * An office is a place in a governmental system created or recognized by the law of the State, which either directly or by delegated authority assigns to the incumbent thereof the continuous performance of certain permanent public duties. A position is analagous to an office in that the duties that pertain to it are permanent and fixed, but it differs from an office in that its duties may be non-governmental and not assigned to it by any public law of the State. An employment differs from both an office and a position in that its duties, which are non-governmental, are neither certain nor permanent."

We have examined a great many authorities where this question is discussed, but find them not of much assistance in determining the particular question before us. However, we are of the opinion that the position of lieutenant in the Police Department of Chicago is not such as may properly be designated an office; nor do we think it such an office, within the meaning of the authorities, as would warrant us in holding that quo warranto was the proper remedy to pursue. The ordinance of the City of Chicago, which is made a part of the petition provides that "there are hereby created the offices of Superintendent of Police, one

(1) Deputy Superintendent of Police, chief identification inspector, chief surgeon, foreman of horses, foreman of repairs, bandmaster, chief operator, manager of properties, department inspector, inspector of moral conditions, drillmaster, custodian of lost and stolen property, secretary of the department, secretary to the superintendent of police, head clerk of the detective division, and such number of captains, lieutenants, patrol sergeants, desk sergeants, detective sergeants, patrolmen, patrolwomen, operators, matrons, and inspectors as may from time to time be provided for in the annual appropriation ordinance." In the appropriation ordinance under the heading of subordinate commanding officers appears: "Lieutenants, 83, at $3700.00, $124,100.00." In the petition the allegation is that a lieutenancy is "an office, position and place of employment."

Upon a consideration of the entire record we are of the opinion that we would not be warranted in holding that the position of lieutenant in the Police Department was an office within the meaning contemned for by defendants. We think the allegations of the petition are sufficient, if true, to warrant the issuance of the writ as prayed for, and the court, therefore, erred in sustaining the demurrers and dismissing the petition.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to overrule the demurrers.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. and TAYLOR, J. concur.

241 - 27198

GEORGE SNYDER CRILLY, FRANK LLOYD CRILLY and EDGAR CRILLY, Trustees, doing business as D. F. CRILLY & COMPANY, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
H. H. NEWELL, Appellant.	

Filed Feb. 16,'23.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 27, 1921, a suit in forcible detainer was begun by the plaintiff against the defendant, H. H. Newell, and on June 7, 1921, a judgment for possession, by the plaintiff, was entered.

On this appeal it is contended (1) thatthe legal title to the premises was in five trustees, only three of whom have brought suit, and that the suit should have been brought in the name of all five trustees, either by themselves or by the three to whom the powers of the five are delegated, and (2) that there is no proof that the defendant was in possession of the premises at the time of the trial or at the time the suit was begun.

The complaint, dated May 27, 1921, filed in the Municipal Court, recites as follows:-

"George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, Trustees, doing business as D.F.Crilly & Company, plaintiff, complain to The Municipal Court of Chicago, that they, the said George Snyder Crilly, et al., doing business as D. F. Crilly & Company, are entitled to the possession of the following described

premises in said City, to wit: The first floor flat of building No. 1712 North La Salle Street in the City of Chicago and that H. H. Newell unlawfully withholds the possession thereof from the said George Snyder Crilly, et al., doing business as D. F. Crilly & Company. Wherefore, they pray a summons, in pursuance of the statute in such case made and provided. Dated May 27th A. D. 1921. George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, Trustees, by George Snyder Crilly Agent."

No pleadings other than the complaint were filed at the trial. A motion to dismiss was made by counsel for the defendant on the ground that the legal title to the land described in the complaint was vested in Erminie Crilly Mathews, George Snyder Crilly, Frank Lloyd Crilly, Isabelle C. Butler and Edgar Crilly, as trustees, under a provision of a trust agreement of January 24, 1917, and that of all the five trustees in whose name the title to the land stands, only George Snyder Crilly and Frank Lloyd Crilly are parties plaintiff. That motion was overruled.

At the trial a lease dated April 7, 1920, which demised the premises in question to the defendant, H. H. Newell, from May 1, 1920 to April 30, 1921, and which was signed "D. F. Crilly and Co., Edgar Crilly, Agent. H. H. Newell." was offered in evidence. An instrument referred to as a trust deed was shown to the trial judge before whom the cause was being tried, without a jury, but which the record does not show was actually offered in evidence; that instrument purports to be a conveyance to five persons, as trustees. Whether or not that instrument describes the property in question here the record does not show. The original complaint in forcible detainer describes the property as "the first floor flat of building No. 1712 North La Salle Street in the City of Chicago", whereas the deed describes a large number of pieces of property giving alone the

pounds in gold 11s, to wit: The first floor flat of building No. 1722 North in Dallas County, in the city of Dallas and Lot 1, R. Powell subdivision within the permanent school fund from the Texas Employer Guilty, et al., being Petitioners as T. Guilty & Company. Therefore, they pray a summons, in pursuance of the remedy by mean same said, and recorded. Dated May 27th A. D. 1922. Employer Guilty, Trust Lizzy Guilty and Edgar Guilty, Trustees, by Employer Guilty, Agent."

Pleadings other than the complaint were filed on the trial. A motion to dismiss was made by counsel for the defendant on the ground that the legal title to the land described in the complaint was vested in Emmitt Guilty Lemmons, Employer Guilty, Trust Lizzy Guilty, Amelia C. Guilty and Edgar Guilty, as trustees, under a provision of a trust agreement of January 24, 1917, and that of all the five trustees in whom none and title to the land remain, only Employer Guilty and Trust Lizzy Guilty are parties plaintiff. That motion was overruled.

At the trial a jury was waived by the defendant, in which case the defendant in question to the defendant, C. H. Powell, from May 2, 1920 to April 30, 1921, and which was signed "C. H. Guilty and Co., Employer Guilty, Agent. H. E. Guilty." was offered as in evidence. An instrument purporting to be a trust deed was shown to the trial judge before which the owner was being tried, without a jury, and with the record that not more was actually offered in evidence the instrument purporting to be a conveyance to five persons, as trustees. Thereby as the sole instrument conveyed the property in question into the trustee also not more. The stipulated description in terms existing conveyance the property as "the first floor flat of building No. 1722 North in Dallas County in the City of Dallas", showing the land described in a large number of similar existing conveyance

legal description of each. That instrument, however, after naming the five trustees and giving the authority to lease, recites as follows:- "That all the power and authority hereby granted to said trustees (meaning the five) shall be exercised by George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly or the survivors or survivor of them acting jointly."

The only testimony offered was thatof George A. Crilly, who was called by the plaintiff. When he was asked if he knew who D. F. Crilly & Company is, he said that that was the name of the trustees of the property. He also stated that he knew the parties named executed the lease in question. On cross-examination he stated that the other trustees, meaning Frank Lloyd Crilly and Edgar Crilly, saw the complaint, apparently meaning that they saw it before it was filed.

In the course of the trial there was considerable colloquy between the court and counsel, especially between Mr. Tanner, counsel for the plaintiff and Mr. King, counsel for the defendant. A number of times Mr. Tanner announced that the defendant was in possession of the property. On one occasion the trial judge asked if the defendant was in possession, to which Mr. Tanner replied that he was, and when the court asked, "Are the parties still in possession?" Mr. Tanner answered, "Yes, they are still in possession." Evidently the trial went on and it was assumed by all parties that no question was to be raised as to whether or not the defendant was in possession, it being assumed that he was. The only question raised by counsel for the defendant at the trial was, whether the complaint was good inasmuch as it purported to be signed only by three of the five trustees.

legal investigation of such. This instrument, however, after
reciting the five tendencies was giving the authority to issue,
Peoples in Illinois "that all measures and activities tending
greatly to make stronger (lessens the first) would be recognized
by Congress (never Utility, first Legal Clarity and Interpretation
of the motivations or motives of them actual legality."

The only testimony offered was Chief Justice Utility.
He was called by the plaintiff. Then he was asked if he knew
who is, Utility's Congress is, he said that that was the issue
of the business of the property. He also stated that in some the
parties based according the issue in question. In cross-examination
that he stated that the Illinois, showing that legal
Utility was Legal Utility, was the complaint, nevertheless meaning
that they saw it before it was filed.

In the opinion of the Court there was considerable
difference between the merit and counsel, especially between
Mr. Jenner, counsel for the plaintiff and Mr. Fing, counsel
for the defendant. A number of times Mr. Fingler cross-read
that the defendant was in possession of the property. In his
examination the Chief Justice stated if the defendant was in pos-
session, he asked Mr. Jenner replied that he was, and then the
court asked, "Are the parties still in possession?" Mr. Jenner
answered, "Yes, they are still in possession." Evidently the
court went on and it was answered by all parties that no cross-
ing was in relation to the utility at all for the reason that
in possession. It could happen that in -ed. The only main
line point is counsel for the defendant of the total and,
whether the complaint was just because is it supported it by
signed only by state of the Time Inventor.

At the close of the evidence counsel for the defendant moved to dismiss on the ground (1) that the deed of trust offered in evidence required all the power to be exercised jointly "and neither this suit or lease is shown to have been the product of the joint act of five trustees." and (2) that "the persons entitled to possession under and by virtue of the terms of the trust deed are the five trustees whose power to exercise their executive authority is delegated to the three, but possession is vested in the five, and, upon the ground that there is no competent proof that D. F. Crilly & Company - that these trustees did business as D. F. Crilly & Company."

The lease is signed "D. F. Crilly and Co., Edgar Crilly, Agent" and, also, by N. H. Newell, the defendant. The complaint is in the name of "George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, trustees, doing business as D. F. Crilly & Company, Plaintiff." The complaint is signed "George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, Trustees, by George Snyder Crilly, Agent." It will be seen, therefore, that the name of the lessor and the name of the complaining party in forcible detainer are the same, that is D. F. Crilly and Company. It is true that in the complaint it is recited that three of the Crilly's are trustees, and doing business as "D.F. Crilly & Company", but that is surplusage, save the expression "D. F. Crilly & Company." That purports to be a legitimate title. It is not like Godsire Estate v. Case, 220 Ill App. 343. There it was held that the plaintiff could not recover for two reasons, first, the words "Godsir's Estate" did not represent, it was admitted, either a natural or artificial person, and, second, the evidence failed to show that the defendant was in possession at the time the suit was brought. There is no

within there of the evidence, however, for, as Brown, and moved to dismiss on the ground (1) that the deed of trust offered in evidence required all the proceeds to be expended "and neither that only or large or least in terms in turn been the product of the joint act of five trustees," and (2) that "the jurisdiction established by prescription which may be therein or the terms of the trust deed are the five trustees whose prior to exercise their unanimity as being delegated to the three, but discussion is vested on the five, and, upon the grounds that there is no requisite proof that T. T. Utility & Company - that there involves the instance of T. Utility & Company."

The issue is stated "A. T. Utility and the T. Utility Utility, Inc." and, also, by T. T. Powell, the defendant. The complaint is in the name of "George Dryden Utility, Fred Lloyd Utility and Edgar Utility, trustees, doing business as T. T. Utility & Company, Utility." The complaint is signed "Utility Engine Utility, Fred Lloyd Utility and Edgar Utility, trustees, by George Engine Utility, Agent." It will be seen, therefore, that the name of the lessor and the name of the complaining party in possible dispute are the same, that is T. T. Utility and Company. It is true that in the complaint it is recited that three of the Utility's are trustees, but giving pleadings an "A.T. Utility & Company", but that is surplusage, were the expression "T. T. Utility & Company." That appears to be a legitimate title. It is not like Dunlap Utility v. Dunn, 2 App. 464. There it was held that the plaintiff could not recover for the reason, first, the words "Dunlap's Utility" did not represent, it was admitted, either a natural or artificial person; and, second, the evidence failed to show that the defendant was in possession at the time the suit was brought. There is no

evidence here that D. F. Crilly and Company was not a proper artificial party. Any number of the Crilly's were entitled, if they saw fit, to use the title. Certainly the defendant could not rightfully dispute it. He accepted a lease signed "D. F. Crilly and Co." and the complaint was in that name. The tenant cannot go back beyond the lease and enter into a controversy as to the source of "D. F. Crilly and Co." Wilghman & West v. Little, 15 Ill. 240. It has been held that a man is bound by any contract into which he may enter in any adopted name, and may sue or be sued in that name. Rich v. Sayer, 7 N. Y. Supp. 69.

As to the contention of counsel for the defendant that there is no proof that the defendant was in possession of the premises at the time of the trial. At the trial the trust deed of Daniel F. Crilly, of January 24, 1917, and the lease upon which this suit is brought were offered in evidence, and then George S. Crilly, the only witness called, was put on the stand and examined, and at the close of his cross-examination, when the counsel for the defendant had said, "That is all." the record shows that the court then immediately asked, "Is he in possession?" and counsel for the plaintiff answered "He is in possession. We ask for judgment and execution;" that then the court again asked, "Are the parties still in possession?" and counsel for the plaintiff said, "Yes, they are still in possession." It is true that no witness took the stand and testified to the defendant being in possession at any time. When, however, the record shows, as it does, here, that twice the trial judge asked in the presence of counsel representing both sides and while the trial was on, whether the defendant was in possession and counsel for the plaintiff in each in-

[illegible] Trial Judge [illegible] in the presence of counsel, instructing both sides and which the trial was on, whether the defendant was the perpetrator and proved [illegible] the plaintiff in such [illegible]

stance stated, expressly, that the defendant was in possession, it does not seem reasonable to hold that the defendant is not estopped by the conduct of his counsel. As we read the record there could be no question in the mind of the trial judge after that colloquy, but that the subject of possession was settled as far as that law suit was concerned, and was not a subject for dispute on the part of the defendant.

When, in the course of a trial, without a jury, the trial judge asks a question of counsel and it is definitely answered and no doubt or controversy arises as to the truth of the answer, and it is sanctioned by the silence of opposing counsel, it is the right of the court to consider the answer as the equivalent of a binding admission or stipulation, and as dispensing with other evidence of what the answer imports. Here there was a controversy as to whether the suit was brought in the right name. Nothing else was contested. And, being a forcible detainer proceedings, the trial judge quite properly, for his own enlightenment, and to help him in determining the matters involved, asked about possession. Counsel for both parties, as officers of the court, were there to help in eliciting the truth and in having justice done, and one of them, the representative of the plaintiff, in answer to a question by the court, said that the plaintiff was in possession, and the other remained silent. That occurred not once, but twice. We are of the opinion, under the circumstances, that the subject of possession cannot now be considered in determining this appeal.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

277 - 27235

NICKLAS P. BERG, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
FORT DEARBORN FIREPROOF STORAGE COMPANY, a corp., Appellant.	

Filed Feb.16, '23.

MR. JUSTICE TAYLOR delivered the opinion of the court.

An automobile of the plaintiff was destroyed by fire while stored at the Graceland Garage, at Irving Park Boulevard and Southport avenue, Chicago. Claiming that the fire was caused by the negligence of an agent of the defendant, the plaintiff brought suit and recovered a verdict and judgment in the sum of $765.00. This appeal is therefrom.

It is not denied that the automobile of the plaintiff was stored at the Graceland Garage and, on the night of the 27th of September was destroyed by fire. The theory of the plaintiff is that one Madden, a workman of the defendant, while working at night on some trucks which belonged to the defendant, and which were in the Graceland Garage, was guilty of negligence in carrying around with him a lantern while putting in gasoline and thus causing the fire; and that responsibility for his acts is imputable to the defendant. On the other hand it is the theory of the defendant, according to its affidavit of merits, that the agent did not act within the scope of his authority in performing the acts, to which the fire was attributed.

Prior to the trial pursuant to leave granted by the court the plaintiff propounded two interrogatories to the defendant. The first of which asked whether the defendant on September 27, 1916, had in its employment a certain man by the name of Madden? The second of which asked how long Madden had been employed by the defendant and what was the nature of his duties? The defendant answered that Madden had been employed by it as night watchman, for about two weeks.

The evidence of the plaintiff was to the effect that he had owned a Marquette automobile for about four years; that it was a 1912 model; that he was in the habit of storing it in the Graceland Garage, which was a public garage; that it was stored there on the night of September 27, 1916; that there was a fire in the garage on that night and when he went there in the morning the automobile was practically all destroyed by the fire; that he subsequently sold the automobile for junk, for $45.00.

The evidence of one Potts, a mechanic, is to the effect that he was present in the Graceland Garage at a quarter past twelve o'clock at night on September 27, 1916, when the fire occurred; that he was night watchman in the garage at that time and was the only man working about there; that he was watching cars and delivering gas and doing service work; that he saw the automobile of the plaintiff in the garage that night; that the fire started on the floor in the middle of the garage; that Madden was "walking around with a lantern just before this fire, around these trucks." When asked what trucks he answered, "The Fort Dearborn Storage trucks". He further testified that he saw the name on the trucks and when asked "What name did

[illegible]

[illegible]

[illegible]

you see on these trucks?" he answered, "The Fort Dearborn Fire Proof Storage Company" and he further testified that it was on the side of the trucks and "was marked big enough for anybody on the street to see it." He said further that he saw Madden "feeding these trucks with gasoline and water getting them ready for the drivers in the morning, he had a lantern right around that gasoline." That he, the witness, warned him; that after Madden got the lantern to light himself around he got a five gallon gasoline can and went up to fill his tank and it spilled over; that "The lantern was setting right on the running board of the car, of the truck" that he had there; that it was hard to get up into the proper place; that he was going to pour it in the tank and "he spilled some gasoline over and there was an explosion from the open tank, the five gallon of gas -"; that Madden then took his coat and ran out, and he, the witness, went out and gave the alarm of fire.

Potts further testified that he saw Madden there for four nights prior to the fire; that he fed the trucks with water and gas and got them ready for the drivers in the morning; that the night of the fire, about five minutes before it occurred, he talked to Madden who was then working in the middle of the garage and told him not to use the lantern, and that Madden said he would not; that he would put it out.

On cross-examination he was asked the question, "You say you warned him not to use the lantern that night and he said he would not, and then you turned around and the next thing you knew there was a fire?" to which he answered, "Yes exactly." He further stated that he, the witness, was night service man there and if any one came in and wished to purchase gasoline he delivered it to him; that he had full charge of that service at night.

yet see no "Ones Ingenuity" in consent, "the fact remains this Great Orange Dragon" and he further exclaimed that it was on the side of the Giants and "we always big enough for anybody on the planet to see it." He said further that he was saddle "feeding those Jewels with gumdrops and jelly giving them ready for the drivers to see morning, he had a lantern right around that gleaming." Then he, the dishwasher, wound away that after ribbon yet the lantern is light blazoff around he's five gallon gumdrop can and just as he fill the sack and it spilled over; that "the lantern was nothing right on the morning hours of the car, of the lamp" that in the flames; that it was hard to get to him the grand dance; that he was going to hear it in the dark and "the rubbed crew machine over and there was no explosion from the open tank, the five gallon of gas -"; that behind the dark he went out and was, and he, the witness, went out and gave the alarm of fire.

Then further testifies that he was behind more for four nights prior to the fire; that he had the trouble with water and gas and got them ready for the lantern in the morning; that the night of the fire, about five minutes before it occurred, he talked to Gaddam who was then working in the middle of the yards and told him not to use the lantern. and that Gaddam said he would not; that he would not it not.

On cross-examination he was asked the question, "You say you warned him not to use the lantern that night and he said he would not, and then you turned around and the next thing you knew there was a fire?" to which he answered, "Yes exactly." The further stated that he, the witness, was night watchman then there and if any one came in and wished to visit he would be allowed it to stay, but he was that

One Conrad, a dealer in automobiles, testified that he knew the plaintiff and the plaintiff's Marquette automobile in September 1916; that he got the car originally from the Marquette people and sold it to the plaintiff; that at that time, in 1912, it was a demonstrating car and had been used about seven months; that the Marquette people did not manufacture automobiles after 1912, although they continued to sell parts until about 1917; that he saw the plaintiff's automobile about two weeks before the fire; that it was a touring car and had the general equipment that goes with an automobile; that he rode in it about six weeks before that time with the plaintiff's son; that its market value on September 26, 1916 was $1,000.00. On cross-examination, he testified that two or three weeks before the fire when calling on the plaintiff he walked around the car and discussed it for some time; that he was endeavoring to sell the plaintiff some tires; that he gave an estimate of $1,000.00, from appearances.

The defendant offered in evidence certain interrogatories propounded to the plaintiff and the answers thereto. The answers are to the effect that the automobile was equipped with one extra tire, two Klaxton horns, one set of tools and two extra lamps; that at the time of the purchase the plaintiff paid $1200.00 for the automobile and its accessories; that prior to its purchase the automobile had been run 3500 miles and since its purchase 6000 miles; that after the fire he was offered $60.00 for the chassis and motor.

The only evidence offered on the part of the defendant, except the foregoing answers, is that of one Smith, an automobile mechanic who had bought and sold cars. He testified in answer to a hypothetical question concerning the second hand

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The Journal, a junior in mathematics, testified that he knew the plaintiff and the plaintiff's injurious automobile in September 1919; that he got the car originally from the Independence garage and sold it to the plaintiff; that at that time, in 1920, it was a five-passenger car and had been very nearly worn out; that the Wernecke Motor Co. had sold Indiana automobiles after 1918, although they maintained in part pride small sales 1919; that in use the plaintiff's automobile about two years before the fire; that it was a Buick and had the original equipment; that the automobile then in 1919 was in good condition; that the market value on Sunday 26, 1921 was $1,000.00. In cross-examination, he testified that he at times walks before the fire when driving on the plaintiff's without turning the car and otherwise; at the same time; that he was endeavoring to sell the plaintiff some time; that he made an estimate of $1,000.00, from depreciation.

The defendant offered in evidence certain statements proponded to the plaintiff and the answers thereto. The answers are to the effect that the automobile was equipped with one extra tire, two Firestone horns, one set of tools and one extra jacket that at the time of the purchase the plaintiff made $1,000.00 for the automobile and it cost more to fix windows the automobile and been the $200 mile and since the purchase 8000 miles; that after the fire he was offered $200.00 for the chassis and motor.

The only evidence offered on the part of the defendant, except the foregoing answers, is that of one Smith, an automobile repairman who had bought and sold cars. He testified

car that the value would be about $600.00. He further testified that he was familiar with the Greenlees Garage and knew the lettering upon the truck that was burned the night in question; that the inscription on the truck was "Fort Dearborn Motor Cartage Company."; that as far as he knew that was not the same concern as the Fort Dearborn Fire Proof Storage Company; that he knew there was in September, 1916, a corporation known as the Fort Dearborn Fire Proof Storage Company. When asked whether there was a corporation known as the Fort Dearborn Motor Cartage Company, he answered that it would be impossible to say because there is supposed to be a concern "but I can't take an oath whether there is or not." He then testified that he knew of a corporation known as the Fort Dearborn Motor Cartage Company which had offices at 4615 Clifton avenue, the same number as the offices of the Fort Dearborn Fire Proof Storage Company. He further testified that an automobile made by a concern that has gone out of business is not as marketable as one that is still being manufactured; that that would take off one-third of its value.

The question arises whether the evidence sufficiently proves negligence on the part of Madden and also whether it sufficiently proves that at the time of the alleged negligence Madden was employed by the defendant and was, when doing the things claimed to be negligently done, doing the things which constituted part of that for which he was employed.

The evidence shows that a man by the name of Madden was, on September 27, 1916, in the employment of the defendant and had been employed as night watchman for about two weeks. These facts are proved by the defendant's answers to the plaintiff's interrogatories.

Further, the defendant's affidavit of merits denies the negligence and "denies that the said agent acted within the scope of his authority", but does not intimate in any way that he did not have an agent present in the garage the night of the fire.

It is also shown by the testimony that a man by the name of Madden, on the midnight in question, was walking around certain trucks in the Grandland Garage, which trucks were marked, "big enough for anybody on the street to see it," "Fort Dearborn Fireproof Storage Company", the name of the defendant and that he had a lantern in his hand and was "feeding those trucks with gasoline and water, getting them ready for the drivers in the morning." Potts said, and it is uncontradicted, that Madden "had a lantern right around that gasoline", and that after Madden got the lantern to light himself around, he got a five gallon can and went up to fill a tank and it spilled over, while the lantern was on the running board, and there was then an explosion from the gas tank. These circumstances, making reasonable deductions therefrom, prove sufficiently that Madden was an employee of the defendant at the time in question; that he was rightfully working upon the trucks, property of the defendant, getting them ready for the next day, and that while actually doing so, he carelessly carried a lighted lantern, and, as a result of undertaking to pour gasoline, a highly inflammable substance, into one of the defendant's trucks, with the lighted lantern standing on the running board, and spilling some gasoline, an explosion and fire took place which resulted, incidentally, in the destruction of the automobile of the plaintiff.

In our opinion all the necessary elements of the cause

Further, his disembodied efficacy of mortal desire the negligence and "leaves that the male actual acted within the people of his accordingly", but does not indicate in any way that it did not have a vicious practical in the people the right of his fate.

It is also known by the testimony that a man by the name of Indian, in his anxiety to escape, was sitting among certain crowd in the crematorium chamber, which irrate more acute, "big enough for anybody on the street to see it, I think because Firgoyed Strange Company". The case of the defendant and that he has a lawyer in his home was the "leaning tower trouble with question and notes, getting them ready for his advice in the morning." Person said, and it is uncontradicted, that Indian "had a lawyer right around that pre-limit", and that after Indian put the lawyer to light Monday morning, he got a free police man and made up to fill a book and it satisfied-ever, while the lawyer was at the meeting house, and there was been an assistant from the lower land. There also witness, having testimonial inculpation conditions, were sufficiently for proper use or origins of the instrument at the time in question, and on the fundamentally varying area the irrate, property of the defendant, taking from inner for the most up, and that with relatively minor so, it merrimonly matter a lighted lantern, was, as a result of overpowering in the curvature, a highly inflammable substance, like the of the defendant's house, with the lighted lantern standing on the burning house, and igniting some kerosine, and explosion and fire took place which resulted, inadvertently, in the destruction of the defendant's of the lantern.

of action declared upon were established by the proof. It is true that the negligence of the employee is imputable to the employer only if the relationship of employee and employer exists at the time of the occurrence in question, and, further, only if the acts, that is the conduct of the employee, charged as negligent, constitute some integral part of the service which he was employed to perform. Keith v. Lynch. 19 Ill. App. 574; Johansen v. Johnston Printing Co., 263 Ill. 236; C. R. I. & P. Ry. Co. v. Frederick Brockman, etc. 78 Ill. App. 141.

The jury evidently believed the testimony of Potts and not the evidence of Smith as it pertained to the lettering on the trucks in the Graceland Garage, and if they believed that testimony of Potts, that belief, in conjunction with the undisputed facts and the admission of the defendant in its answer to the interrogatories, sufficiently show a liability for negligence. It is a fair presumption that Madden, admitted by the defendant to be its night watchman, taking charge of trucks of the defendant at night, working about them, getting them ready for the morning, putting in gasoline, especially in the absence of any evidence to the contrary, was doing his designated duty, these things he was employed by the defendant to do. In view of the psychology of these days, it would be violence to common sense, to assume that Madden was working around the defendant's trucks voluntarily, without authority and without pay. Considering all the evidence we are of the opinion that the jury was justified in concluding that the defendant was liable.

It is contended on behalf of the defendant that the trial judge erred in refusing to submit to the jury the following questions of fact:-

of action contained upon more established by the proof. It is true that the negligence of the employer of importance to the employee only if the relationship of employer and employee exists at the time of the occurrence in question, but, provided, only if the note, that is the contract of the employee, showed an original, constituted some important part of the service which was the original of problem. Cf. Lemon, 32 III. App. 272; Hammond v. Jamestown Furniture Co., 227 Ill. App. 1; Q. C. L. R. Co. v. Frederick Brewing Co., 77 Ill. App. 341.

The jury evidently believed the testimony of Hale and not the evidence of Smith as to the petitioner in the factory on the morning in the disputed period, and if they believed that testimony of Hale, that belief, in conjunction with other proved facts and the admission of the defendant in its answer to the interrogatories, sufficiently made a liability for negligence. It is a fair presumption that Hooker, captured by the defendant to be its night watchman, taking charge of trucks of the department at night, working about them, getting them ready for the morning, waiting in readiness, especially in the absence of any evidence to the contrary, was doing his duty, these things he was employed by the defendant to do. In view of the jurisprudence of these days, it would be ridiculous to assume, to assume that Hooker was waiting around the defendant's premises voluntarily, without authority and without pay. Considering the evidence as one of the opinion that the jury was justified in concluding that the defendant was liable.

It is unnecessary to notify of the defendant that the trial judge erred in refusing to submit to the jury the follow-

"(1) Was it the duty of the Graceland Garage owners to fill the tanks of the trucks of the defendant company with the gasoline purchased from them at their garage?
(2) Was there any duty within the scope of the employment of the servant of the defendant in respect to the particular transaction out of which the injury complained of arose, that the performance of, would have caused the burning of the automobile of the plaintiff?"

The trial judge did submit a third question of fact to the jury. It was as follows: Did the servant of the defendant perform some act outside of the scope of his employment, in doing his master's business that caused the injury complained of?", and the jury answered it, "No."

It would appear that the trial judge was right in refusing to give the first question to the jury for the simple reason that there was not a scintilla of evidence in the record as to the duty of the Graceland Garage in regard to filling the tanks of the trucks of the defendant with gasoline and it was, therefore, irrelevant. Further, as to the question of fact, numbered two: We think the trial judge properly refused to submit it to the jury, inasmuch as in its essence it was the same as number three which the court did give to the jury, and which the jury answered in the negative.

It is contended on behalf of the defendant that the trial judge erred in allowing the witness Conrad to testify to the market value of the plaintiff's car on September 26, 1916. The argument is that he was not qualified as an expert. The answer to that is that Conrad on cross-examination testified that he had been selling automobiles for fifteen years; that experience certainly justified the admission of his statement that the market value of the automobile was $1,000.00

on September 26, 1916. Some other objections are made as to testimony that was admitted but they do not seem substantial.

It is contended on behalf of the defendant that the trial judge erred in requiring the defendant, a corporation, to answer interrogatories. We think the contention untenable. The argument is that the order should have directed the interrogatories to be answered by the directors, officers, superintendent or managing agent of such corporation. In the instant case the interrogatories were answered by one F. D. Fulton, as agent. Counsel contend it does not appear that Fulton was director, officer, superintendent or managing agent of the defendant corporation. The record shows that the interrogatories which were answered by Fulton as the agent of the defendant were made in compliance with an order of the court and that no motion to suppress and no objection of any kind was made until they were read in evidence at the trial; and, that the only objection then made was as to the form and not as to the competency of the evidence.

In the document which purports to contain the answers of the defendant to interrogatory one, it is recited, parenthetically, as follows: "Subject to objection of the defendant and their attorneys, that interrogatory is improper, as calling for the name of a witness." That objection, we think, however, is untenable, as the interrogatory simply asked if the defendant on a certain day had in its employment a certain man by the name of Madden. That was a fact the plaintiff was entitled to ask about, even though he might subsequently call him as a witness.

as contained in, Will. Only after objections are seen to be unsound, that one abandons but does do not even consistent.(7)

It is mentioned on behalf of the defendant that the trial judge erred in rejecting the testimony, a stenographer, in answer interrogatories. To which the evidence inadmissible. The argument is that the author should have directed the interrogatories to be answered by the directors, officers, employees or managing agents of such corporation. In the instant case the interrogatories were answered by one V. B. Tilton, as agent. Counsel contend it does not appear that Tilton was director, officer, superintendent or managing agent of the defendant corporation. The record shows that the interrogatories which were answered by Tilton as the agent of the plaintiff were not filed as evidence nor did he testify at the trial and also no action is approved and no objection of any kind was made until they were read in evidence at the trial. Hence the only objection that could be raised is the form and not as to the competency of the evidence.

In the document which purports to contain the answers of the defendant to interrogatory one, it is recited, "respectfully", as follows: "Subject to objection of the defendant and that otherwise, that interrogatory is improper, as calling for the mere of a witness." That objection, we think, however, is untenable, as the interrogatory clearly asked if the defendant is a certain day and in the employment a certain man by the name of Tedman. That was a fact the plaintiff was entitled to get about, even though he might subsequently call him as a witness.

It is contended for the defendant that the damages are excessive. Conrad, a dealer in automobiles, who knew the one in question, said its market value at the time of the fire was $1,000.00. The answers of the plaintiff to defendant's interrogatories showed that he paid $1200.00 for it, that when he bought it, it had run 3500 miles and had run 6000 miles since. The only evidence in dispute of Conrad's is that of Smith, in answer to a hypothetical question, and he puts the value, approximately at $600.00. There is no evidence what the car cost when it was new. Considering the testimony of Conrad, that its market value was $1,000.00; that the plaintiff paid $1200.00 for it, and had run it, since then, 6,000 miles, and that the defendant's only witness put the value, in answer to a hypothesis at $600.00, we feel that we are not entitled to consider a verdict of $765.00 as excessive.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

27372
414 - 27372.

CLEMENS TURLUK,

Appellee,

v.

MORRIS HACKIN, Administrator
et al.

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Filed Feb. 16, '23.

Mr. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant from a judgment upon a verdict of a jury, that the defendant unlawfully withheld certain premises from the plaintiff.

On April 18, 1918, Isaac Hackin leased, in writing, a store and four rear rooms, located at 1200 North Ashland Avenue, Chicago, to Joe Larner. The term was May 1, 1918, to April 30, 1921. The rent was $30.00 each month, in advance, for the first year, $31.00 the second and $32.00 the third. The lessee had the privilege of two years more, after April 30, 1921, at a monthly rental of $35.00. There was a provision that the lessee deposit $50.00 with the lessor as security. The lease, also, contained the following words, "In the event of party of 2nd part agrees to sell then party of the first part agrees to accept anyone party of 2nd sells the same conditions and lease." Joe Larner deposited the $50.00 as security, and occupied the premises until December 18, 1919, when he sold out to one Slowinski.

Isaac Hackin died on December 9, 1919, leaving three children, Morris Hackin and Abe Hackin and a daughter, Rose Fagan. She died subsequently leaving three minor children. Morris Hackin became administrator of the estate of his father, Isaac Hackin.

When Larner sold out and assigned the lease, in writing, on its back, on December 19, 1919, to Slewinski, according to Larner's testimony, he got back his deposit of $30.00, and Slewinski paid a corresponding amount as a deposit to Morris Hackin. It is assumed by counsel for both sides that Morris Hackin consented to the assignment by Larner to Slewinski. The latter says that, while he had the lease, he paid $31.00 a month, also, that he never got back his deposit of $30.00. Slewinski was in possession from December 19, 1919, to March 13, 1920.

On March 13, 1920, Slewinski sold out the place and assigned the lease, in writing, to one Zurowski. That assignment was consented to by Morris Hackin, in writing, on the back of the original lease. In June, 1920, Zurowski sold the store and lease to Albert Stock. To that transfer Morris Hackin consented in writing. Stock went into possession; he died on July 17, 1920. His widow, Mary Stock, sometime in July, 1920, the exact date is not stated, sold the store and lease to one Wozniak. The latter says he bought it about the end of July, 1920. He further says Mrs. Stock gave him the lease, but that Morris Hackin never signed any consent to the assignment and never gave him any papers of any kind. Further, that he paid rent twice, one amount being $32.00 and the other $35.00, for August and September, 1920, to Morris Hackin. The latter says that Wozniak stayed in terms months and paid him $40.00 the first month, $35.00 the second month, and $40.00 the third month. Morris Hackin further says that Wozniak never brought the lease to him nor did he, Hackin, assign it to him.

On October 18, 1920, Wozniak sold the place, apparently including the lease, or whatever rights he had in it, to one Rzeznicsak. The latter went into possession and ran the store from October 18, 1920, to February 14, 1921, and paid $45.00 a month as rent for the months of November and December, 1920, and January and February, 1921, to Morris Hackin, paying up to March 1, 1921. Rzeznicsak says he

got the lease from Wozniak at the time he bought the place, but that he never took the paper to Morris Hackin and never had any talk with him as to how long he was to stay there.

On February 24, 1931, Raczniczek sold the personal property composing the grocery store, by bill of sale, acknowledged, to one Clemens Turluk, the plaintiff, for $1600.00; $1100.00 in cash and a note for $500.00, and on February 26, 1931, assigned, by writing on the back of the original, all his interest in the lease of April 15, 1918, to the plaintiff. The plaintiff took possession on February 24, 1931, Raczniczek and his wife occupied part of the premises until March 4, 1931, while looking for new quarters. The plaintiff remained in possession until Morris Hackin took possession, on March 18, 1931, under a writ of restitution issued in a forcible detainer case (No. 777146) between Morris Hackin, Adm'r. etc. v. Raczniczek, in the Municipal Court of Chicago.

There is some controversy as to what occurred between the plaintiff and Morris Hackin. The plaintiff says thatne saw Hackin on February 28, 1931, and told him that he had bought the store; that Hackin told him that if he would pay $50.00 a month he could stay; that he said he would pay the amount specified in the lease; that Hackin said if he did not pay $50.00 per month he would not be accepted as a tenant; that on March 1, 1931, he tendered $51.00 to Hackin but it was refused; that the first time he knew Raczniczek was sued for possession was March 4, 1931,when he moved out. The writ of restitution in the cause No. 777146 (supra) was served on March 18, 1931. The plaintiff says the bailiff put him out about three days after the writ was served.

Morris Hackin testified that on January 27, 1931, he served a notice on Raczniczek to terminate his tenancy. That notice was put in evidence and recites that the tenancy would terminate on February 28, 1931. Hackin says that on March 2, 1931, he saw the

plaintiff in the store and asked him what he was doing there; that he told the plaintiff that he had started suit for possession; that he had given Rzeszniczek thirty days written notice and that he had two months from the written notice to get out; that the plaintiff told him he had already paid a deposit of something like six or seven hundred dollars; that he, Haskin, told him he had better get his money back; that that evening they went to Rzeszniczek; that he (Haskin) asked Rzeszniczek why he had fooled these people; that Rzeszniczek said: "I have sold them the place and told them there was no lease"; that the plaintiff and he (Haskin) had some talk about the plaintiff getting another place; that he told the plaintiff if he would help him, Haskin, so he could have no court trouble about getting possession and eviction he would help him get a certain store; that the next day he went with the plaintiff to see a store on Milwaukee Avenue, and the plaintiff was ready to move until he got hold of some lawyer who, he said, told him he could "stick" where he was for six months without being evicted. He further testified that the plaintiff told him he was going to kill Rzeszniczek; that he, the witness, advised the plaintiff to get a lawyer; that he and the plaintiff went to Judge LeBuy's brother who told him to go to the Municipal Court and swear out a warrant for having been cheated by a confidence game. The plaintiff testified that he went to see Reniff, a lawyer, in reference to a case against Rzeszniczek. Subsequently a warrant was duly sworn out on behalf of the plaintiff against Rzeszniczek.

Morris Haskin says that at the time his father signed the leases there were three copies; that he, Morris, collected the rents from the different parties who were in the store; that there was no new lease made with any of the parties; that he assigned all of them up to the time Rzeszniczek moved in; that he did not assign the lease

to him and no lease was made to him; that his relations with him were orally made; that he was to stay there two months and no more.

On March 3, 1921, Morris Hackin, Adm'r. etc., brought suit against Rzezniczek in forcible detainer, pursuant to the notice of January 27, 1921. Service was had on March 3, 1921, and on March 9, 1921, there was judgment for possession. A writ of restitution was issued under date of March 15, 1921, and possession obtained on March 17, or 18, 1921.

The instant case, in forcible detainer, was begun by the plaintiff Turlak, in the Superior Court on March 25, 1921, against Morris Hackin, Administrator of the estate of Isaac Hackin, deceased, Morris Hackin, and Dennis Egan, Bailiff of the Municipal Court. There was a trial by jury on June 13, 1921, and a verdict and judgment for possession in favor of the plaintiff.

From the foregoing it will be seen that the judgment in the Municipal Court, pursuant to which a writ of restitution was issued against Rzezniczek, was res adjudicata as far as the rights of Rzezniczek were concerned. The question then arises, whether Rzezniczek's dealings with the plaintiff gave the latter such rights, as against the defendant herein, that he, the plaintiff, was entitled to possession of the premises. It is the contention of counsel for the plaintiff that by reason of the assignment clause in the original lease, and representations made by Rzezniczek to the plaintiff, in conjunction with the possession of a copy of the lease, which creates something, as it is claimed, in the nature of an estoppel, the plaintiff is entitled to possession and that judgment should stand.

On February 15, 1921, Rzezniczek by means of a written assignment on the back of the original, or one of the copies of the lease, purported to transfer all his interests in the lease to the plaintiff. That occurred five days before the defendant herein brought suit in forcible detainer pursuant to the notice of January 27, 1921, against Rzezniczek. It must be born in mind that although Rzezniczek

occupied the premises from October 18, 1930, to February 24, 1931, and paid $45.00 a month rent, no assignment was ever made to him by Hackin of the lease in question. Although Rzezniczek says he got the lease from Wozniak when he bought the place, there is no evidence that the lease was ever assigned to him by the lessor. Hackin says it was not. It would seem, therefore, that the tenancy of Rzezniczek, which was at $45.00 a month, and was made without an assignment of the lease, cannot be considered as a tenancy under the lease in question. As a matter of fact the lease in question provided only for a rent of $31.00 a month and not for $45.00 a month, the amount Rzezniczek actually paid. Further, the plaintiff, himself, testified that he saw Hackin on February 25, 1931, and told him that he had bought the store and that Hackin told him that if he would pay $50.00 a month he could stay and be accepted as a tenant but that he, the plaintiff, told Hackin that he would pay only the amount specified in the lease and that on March 1, 1931, he tendered $31.00 to Hackin but it was refused. That shows positively, by the evidence of the plaintiff himself, that he made no express personal terms with Hackin in regard to the tenancy and that he was a trespasser unless he obtained some rights under the lease itself by his dealings with Rzezniczek. It may be true that Rzezniczek purported to assign a copy of the original lease to the plaintiff on February 25, 1931, the day, according to the plaintiff himself, when he had his talk with the defendant, Hackin, and learned that he was unable to make terms with Hackin for a tenancy of the premises. But the delivery of a copy of the lease, by Rzezniczek to the plaintiff, could not give rise to any rights in the latter. There could be no estoppel. Rzezniczek himself did not hold under it, and he could not pass rights which he himself did not have, nor could he by making representations to the plaintiff, by reason of the possession of the paper itself, in any way, bind the defendant. The plaintiff

cannot reasonably claim that the defendant was in any way instrumental in deceiving him, in leading him to believe that Rzeznicsek could by that paper give him, the plaintiff, a lease. There was no obligation on the plaintiff, to undertake to get hold of, by replevin or otherwise, the paper which Rzeznicsek had, and under which Rzeznicsek had no rights.

There is an ambiguous clause in the lease which purports, however, it may be said, to bind the lessor to accept as tenant anyone to whom the lessee sells. The exact language is "party of the first part agrees to accept anyone party of 2nd sells the same conditions and lease." But even that provides for the "same conditions" and the evidence shows that Rzeznicsek himself did not occupy the premises upon the same conditions as those provided for in the lease. Then, too, the clause in the lease is "in the event of party of 2nd part agrees to sell", and the lease defines party of the second part with these words, "Joe Larner party of the second part". There is no suggestion that all further assignments such as those of Jurowski, Stock, Tomlak, and Rzeznicsek (considering the latter as an assignee for the sake of argument) should have that extraordinary right without the assent or sanction of the lessor.

Some contention is made on behalf of the plaintiff that Morris Hackin, Administrator of the estate of Isaac Hackin, deceased, had, as a matter of law, no control of the estate of the deceased, and that it was for the heirs of Isaac Hackin and not the administrator to question the plaintiff's rights under the lease that was entered into by Isaac Hackin in his life time. We do not consider that of importance or material here. The plaintiff recovers, if at all, only onthe strength of his own title, and we hold that he had none.

It would seem, therefore, as the evidence shows, that the defendant never recognized the assignment of the lease to Rzeznicsek, and as Rzeznicsek during his terms of tenancy made special terms with Hackin, paying $40.00 a month instead of $31.00 a month as provided

by the lease, as a judgment for restitution of the premises was obtained by Backin against Rzezniczek upon the notice which was served on Rzezniczek by Backin before the plaintiff had any negotiations with Rzezniczek, and as the plaintiff testified that on February 20, 1931, he was unable to make terms with Backin, as Backin wanted $50.00 a month and refused to accept $32.00 a month, and as the evidence shows that Backin never consented to an assignment of the original lease by Rzezniczek to the plaintiff, and according to the terms of the lease Rzezniczek had no authority to make an assignment without the consent of the lessor - that the plaintiff was not entitled to possession of the premises when he brought this suit, and, accordingly, the judgment must be reversed.

REVERSED.

Thomson, P. J. and O'Connor J. concur.

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JANET S. KENYON,
Appellee,

v.

JOHN PRITCHARD, et al,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Filed Feb. 16,'23.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 6, 1919, the plaintiff, Janet S. Kenyon, began a suit of trespass on the case in the Superior Court of Cook County, against the defendants, John Pritchard and Justus Brunner, copartners, doing business under the firm name and style of Dixie Highway Market. The ad damnum was $25,000.00.

On August 25, 1919, the defendants appearance was entered by Block, Hulke and Feigenheltz. On September 17, 1919, pursuant to a stipulation of the parties, the time for filing the declaration by the plaintiffs was extended sixty days from September 25, 1919. On October 25, 1919, the plaintiffs filed their declaration. That declaration consists of five counts. The first count alleges that on July 9, 1919, the defendants were in possession of and, by their servant, operating an automobile truck on Western avenue in a southerly direction just south of its intersection with High street in the City of Blue Island, Ill.; that the plaintiff alighted from a street car that had been going north on Western avenue and which had stopped at the intersection to allow passengers to alight, and went around the rear platform of the street car and started to cross Western

avenue in a westerly direction, exercising at the time ordinary care and caution for her own safety; that the defendant's, by their servant, so negligently and carelessly operated an automobile truck that it struck her with great violence and seriously injured her. The second count is based on the violation of the city ordinance as to speed. The third count charges willful and wanton conduct and management in the operation of the truck. The fourth count charges a violation of the statute requiring that motor vehicles shall be provided with good and sufficient brakes. The fifth count charges a violation of the statute which provides that motor vehicles shall be provided with suitable bells, horns or other signaling devices.

On February 8, 1921, an order was entered defaulting the defendants for want of a plea and ordering that the plaintiff have and recover the damages she had sustained. That order recited also that the defendants had entered their appearance but had failed to plead as required by rule of court.

On April 1, 1921, the record shows that there was a reference to a jury to assess the plaintiff's damages; the verdict of a jury assessing those damages at $2,000.00, and judgment by the court; that the plaintiff recover that amount with costs from the defendant. The record shows that on April 2, 1921, the last day of the March term, 1921, a motion to set aside and vacate the judgment and verdict, which had been entered the day before, was continued to the April term of the court.

On April 16, 1921, an order was entered pursuant to motion granting leave to Beasler, Sippus and Hess, to enter their appearance as attorneys for the defendants. The record shows there was entered, at that time, the following:-

"This cause coming on now to be heard upon the defendants' motion heretofore entered herein to vacate that judgment entered herein of record on April 1, 1921, after arguments of counsel and due deliberation of the court said motion is overruled and denied to which the defendants except."

And, that an appeal from that order to the Appellate Court was allowed with bond in the sum of $2500.00 and bill of exceptions within sixty days.

On April 30, 1921, the record shows that a motion was made to amend and correct the proceedings, verdict and judgment therefore rendered on April 1, 1921, and on that date an order was entered reciting that the defendants had been duly notified but did not appear in opposition to the motion. The order also recites that from certain facts appearing in the personal minutes and the records of the court, the proceedings, verdict and judgment of April 1, 1921, be amended and corrected nunc pro tunc as of April 1, 1921, to show that the suit was regularly reached and called from a printed trial calendar of the court and the defendant was duly called three times in open court but did not come; that a reference was had to a jury to assess the damages; that a jury was ordered and came and was sworn and assessed the plaintiff's damages at $2,000.00, and that it was ordered by the court that the plaintiff recover from the defendant the sum of $2,000.00 together with her costs and for execution therefor.

On May 12, 1921, pursuant to a stipulation, Bassler, Rippus and Rose withdrew as attorneys for the defendants and Lurie and Fishell were substituted therefor, and it was ordered that the time for the defendants to file their appeal bond be extended to include May 26, 1921.

On May 18, 1921, the appeal bond of the defendants in the sum of $4100.00 was approved and ordered filed. On June 4,

> "This cause coming on now to be heard upon the defendant's motion heretofore entered to set aside the judgment entered herein on April 1, 1921, after argument of counsel and due deliberation of the court said motion is overruled and denied to which the defendant excepts."

And, that an appeal from that order to the Appellate Court was allowed with bond in the sum of $1000.00 and bill of exceptions within sixty days.

On April 26, 1921, the record shows that a motion was made to quash and vacate the proceedings, verdict and judgment theretofore rendered on April 1, 1921, and on that date an order was entered reciting that the defendants had been duly notified but did not appear in opposition to the motion. The order also recites that from certain facts appearing in the personal knowledge and the records of the court, the proceedings, verdict and judgment of April 1, 1921, be vacated and corrected nunc pro tunc as of April 1, 1921, to show that the suit was regularly reached and called from a printed trial calendar of the court and the defendant was duly called three times in open court but did not appear; that a reference was had to a jury to assess the damages; that a jury was impaneled and sworn and the cause heard who assessed the plaintiff's damages at $1,000.00, and that it was ordered by the court that the plaintiff recover from the defendant the sum of $1,000.00 together with costs and that execution issue.

On May 13, 1921, pursuant to a stipulation, Messrs. Ripley and Ross withdrew as attorneys for the defendants and Lewis and Bicknell were substituted therefor, and it was agreed that the time for the defendants to file their appeal bond be extended to include May 26, 1921.

On May 26, 1921, the appeal bond of the defendants was [illegible]

1921, the defendants presented to the court their interlocutory bill of exceptions for approval. In the interlocutory bill of exceptions it is recited, over the signature of the trial judge, that the motion to amend and correct the proceedings, verdict and judgment of April, 1921, and the order thereon were made and entered on May 2, 1921.

On June 14, 1921, the defendants presented their bill of exceptions for approval and it was marked presented and the time to file it was extended sixty days from that date, and on July 9, 1921, a bill of exceptions was approved and filed nunc pro tunc as of June 14, 1921.

It is contended on behalf of the defendants that the trial judge erred in refusing to vacate the verdict and judgment of April 1, 1921, and that the judgment should be reversed and the cause remanded with directions to permit the defendants to put in their defense. In the briefs of counsel three other alleged errors (1) pertaining to the default of the defendants on February 8, 1921, (2) entering the ex parte judgment of April 1, 1921, and (3) entering the so-called "corrected and amended" order of May 2, 1921, are discussed. On oral argument before us, however, it was understood that we should consider merely (1) whether the affidavits that were filed sufficiently showed a meritorious defense, and (2) whether there was a reasonable excuse for not having made a defense. We shall consider these questions in the inverse order.

Is there a reasonable excuse for the defendants' failure to make a defense? Mason v. McNamara, 57 Ill. 274. The greatest diligence was not necessary. Allen v. Hoffman, 12 Ill. App. 576. In the latter case this court said, "All he was bound

to show was a meritorious defense, and the exercise on his part of reasonable and ordinary care and diligence." Of the two burdens which rested upon the defendants, that which involves showing a meritorious defense is the more important. Baugh v. Suter, 3 Ill. App. 274. In the latter case this court said, "We regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is evidently unjust, a certain degree of neglect may, especially as terms can be imposed, be held to be excusable."

The defendants in the course of the trial were represented by three different sets of attorneys; the attorneys who entered the appearance for the defendants on September 17, 1919, were Block, Mulks and Feigenholtz; on April 16, 1921, the day that the motion to vacate the judgment was considered by the trial judge they withdrew and Bassler, Sippus and Rose were substituted; and on May 12, 1921, the latter firm withdrew and Lurie and Fishell were substituted.

The affidavit of one Heintz, in support of the motion to vacate, is to the effect that on July 9, 1919, at the time of the occurrence in question, the Dixie Highway Market was insured in the Illinois Automobile Insurance Association. In the affidavit of one Block it is stated that he was attorney for the Illinois Automobile Insurance Company and on August 28, 1919, received from that company a summons which had been served on the defendant and that on that day he filed the defendants' appearance. Block further stated that about January 1, 1920, all the cases of the Illinois Automobile Insurance Company which he had charge of were taken out of his hands and that he gave that company a substitution of attorneys in order that Bassler, Sippus and Rose might be substituted in his stead, and that at the request of the Illinois Automobile Insurance Company he then

ceased to look after the parties represented by that company. One Heintz in an affidavit presented on a motion to vacate stated that he represented the Illinois Automobile Insurance Company and the Central Casualty Underwriters and that after July 11, 1920, the Dixie Highway Market, a corporation, carried no insurance with either of those companies and so was never notified of the bankruptcy of the Illinois Automobile Insurance Company.

The defendant, Brunner, in his affidavit stated that he had no notice that the cause was set for trial on April 4, 1921, and no notice that a default had been entered; that the first information he received on the subject was when Kessler, Bippus and Rose telephoned him that a hearing had been had and a judgment for $2,000.00 entered against them; that he then went to them and at once undertook to engage counsel to take care of the matter.

It, therefore, appears that at the time of the occurrence in question the plaintiffs were insured in the Illinois Automobile Insurance Association, and that the summons was given that company in order that the charge against the defendants might be taken care of by it. Under these circumstances it was not unreasonable for the defendants to place some reliance on and confidence in the insurance company, believing in the normal order of things that that company would take care of the defense. Then, too, it seems quite probable that the insurance company would have been diligent in the matter had it not been that Block, attorney, on January 1, 1920, was relieved of the trial of all causes placed by the said insurance company in his hands. The change of attorneys which occurred might easily account for some oversight or seeming negligence. Further,

caused an issue after the policies represented by Shakespeare. The claims is so clearly presented as - unless to provide social insight regarding the Illinois Independent Insurance Company and the United Insurance Underwriters and Insurance July 31, 1980, the State Attorney Barnes, a representative, said that no insurance also allows of large companies but so was never available at the beginning of the Illinois Independent Insurance Company.

The defendant, Burnham, in his affidavit admits that he had to realize that the money was not for trial on April 4, 1983, and he admits that a letter and then another, that the first information on received on Independent the Blue Shield, Bigna and some telephone bill that a business had been had and a judgment for $2,000,00 actually claims that, to the most to take out of such activity to change provided in the name of the motion.

It, therefore, appears that at the time of the transaction the validity were insured in the Illinois Independent Insurance Company, and which another the plaintiff that company in order that the origin claim the information might be taken care of by [illegible]. Under these circumstances it was not the reasonable for the defendants to find such a claims on and confidence in the Insurance company, believing in the normal order of things that insurance which only after the return. Then, two, it seems quite probable that the insurance company would have been diligent in the matter but it not been that Block, attorney, on January 3, 1980, was relieved of the trial of all matters placed by the state insurance company in his hands. The change of attorney, which occurred right really

after July 11, 1920, the Dixie Highway Market according to Heintz carried no further insurance with the Illinois Automobile Insurance Company, and so were never notified of the bankruptcy of that company. All together, quite obviously, the situation was one that might quite reasonably lead to a failure diligently to follow up the defense and thus account for the failure to file a plea or to be present when the case was called for trial. We are of the opinion that the affidavits in support of the motion to vacate sufficiently show "a good excuse for not filing the plea or keeping closer watch of the case." Kalkaska Manufacturing Co. v. Thomas, 17 Ill. App. 238.

Do the affidavits which were filed sufficiently set forth and show a meritorious defense?

Six affidavits purporting to set forth a meritorious defense were presented to the trial judge. The affidavit of one Davies, a physician, is to the effect that on July 9, 1919, he witnessed an accident at the intersection of Western avenue and High street, Blue Island; that a Ford delivery car owned by the Dixie Highway Market was running on Western avenue where it intersects High Street "and while said Ford delivery car was running on the right side of the street a certain street car traveling in the opposite direction stopped at High street in Blue Island when * * * Janet Kenyon came from behind the street car and stepped in front of the Ford delivery car and was struck by the said automobile."

The affidavit of one Schreiber is to the effect that he was a witness to the accident. He says that a Ford delivery car, owned by the Dixie Highway Market "was running upon Western avenue where same intersects High street and while said Ford delivery car was running on the right side of the street a

certain street car traveling in the opposite direction stopped at High street in Blue Island. At the said time and place the Ford delivery car was running at a moderate rate of speed when a certain woman (the plaintiff) * * * came from behind said street car and stepped in front of the Ford delivery car and was struck by the said automobile."

The affidavit of one Uhlman recites that while employed on July 9, 1919, by the Dixie Highway Market as a driver and driving a Ford delivery car, owned by the Dixie Highway Market, at the intersection of Western avenue and High street on the right side of the street "he met a certain street car traveling in the opposite direction at about the time the said street car stopped at High street in Blue Island." He further deposes that he was driving at a moderate rate of speed when the plaintiff "came from behind said street car and without notice to this affiant stepped in front of the automobile being driven by this affiant and before this affiant had time to bring his aforesaid automobile to a stop the aforesaid Mrs. Kenyon was struck by the aforesaid automobile."

An analysis of the three affidavits shows that Davies, Schreiber and Uhlmann all said that the automobile was running on the right side of the street; that the car stopped at High street; that is at the intersection; that the plaintiff came from behind the street car and that she stepped in front of the automobile which then collided with her. Schreiber and Uhlmann depose further that the automobile was running at a normal speed and that it was owned by the defendant. Uhlman deposes further that the automobile met the street car at about the time the latter stopped at High street.

certain clumsy car travelling in the opposite direction stopped at high speed in front of the jalopy. At the same time our plucky Ford delivery car was running at a moderate rate of speed when a certain woman (the chauffeur) [illegible] near from making such a car employed to travel at the Ford delivery car collision with by the said automobile."

The affidavit of one Edmund Trotter stated that while employed on July 9, 1929, by the Ganie Lightning Battery as a driver and driving a Ford delivery car, owned by Sam Ganie Lightning Battery, at the intersection of Fourth Avenue and High Street on the right side of the street when but a certain driver was travelling in the opposite direction in which the said affiant was driving, the said affiant was driving at a moderate rate of speed when the chauffeur "come from behind made signal and without notice to this affiant stopped in front of the automobile being driven by said affiant and before this affiant had time to bring his aforesaid automobile to a stop the left-front wheel was struck by the aforesaid said automobile."

An analysis of the three affidavits show that Lanion, Somerhoe and Gibson all said that the automobile was running on the right side of the street; that the car stopped in high speed; that it at the intersection; that the chauffeur come from behind the stopped car and that the stopped in front of the automobile which collided with her. Somerhoe and Gibson further that the automobile was running at a normal speed and that it was owned by the defendant. Gibson appeared further that the automobile was the sixth car in the time the latter stopped at high speed.

The first declaration contains five counts. The first alleges that the plaintiff went behind the street car which had stopped and was exercising ordinary care and caution for her safety but that the automobile was negligently operated, etc. The second charges a violation of the ordinance as to speed. The third charges willful and wanton negligence. The fourth, violation of the statute requiring good and sufficient brakes. The fifth, violation of the statute that motor vehicles shall be provided with suitable bells, horns or other signaling devices.

Considering the various causes of action set forth in the declaration it becomes quite obvious that the facts set forth in the affidavits do not constitute a meritorious defense. For example, it may well be that Uhlman was driving the Ford truck at a moderate speed and on the right side of the street, and when the street car was standing still, and that the plaintiff came from behind the street car, and, yet, if the driver was not paying attention, was careless, was looking away, he would be negligent and the plaintiff would be entitled to recover. The affidavits did not undertake in any way to defend against the allegations in the second, fourth and fifth counts.

The courts are always loath to refuse to vacate a judgment which has been entered upon the default and absence of the defendant. There are many cases in the books illustrating the general attitude of the courts on that subject. In limine, it is wholly within the discretion of the trial judge, and unless in a court of review from an examination of the record it well appears that that discretion has been abused, his judgment should

stand. In the instant case we are of the opinion, from a careful analysis of the affidavits, and giving their contents an indulgent interpretation, that quite obviously they did not allege and set forth a meritorious defense.

It is contended that the affidavits set up non-ownership of the truck as a defense. But as the declaration is not based on ownership, but alleges possession and operation by a servant of the defendants, that contention is untenable.

It is also contended that the default was irregular, but, at the trial, and in support of the motion to vacate, that matter was not urged, and so cannot now be considered here.

Under the circumstances the judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

ximal. In the instant case we see of the spiral n, from a mathematical analysis of the antiderivative, and giving their existence an illegant interpretation, that quite evidently they did not differ and not form a continuous pattern.

It is mentioned that the antiderivative not by non-singularity of our input or a mistake. But be the implication is not taken as monstrably, but a simple pseudo-solution not therefore by a lemma of the difficulty, that mathematic is impossible.

It is also mentioning that the orthogly was irrequisite, but, as our trial, and in any case of the motion to remain, that matter was not argue, and so cannot now be mentioned here.

Here the discussion the judgment will be written.

-REFERENCE-

THOMSON, J.C. The Circle, J. Study.

449 - 27407

A. KLIPSTEIN & COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
CHARLES T. MORRISSEY, trading as CHARLES T. MORRISSEY & CO., Appellees.	

Filed Feb. 16, '23.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit on November 6, 1919, for $595.35 for nine bags of Prime Casein. The defendant filed an affidavit of merits, and a set-off for $170.42. There was a trial by jury with a verdict and judgment in favor of the defendant in the sum of $114.70, and this appeal is therefrom.

The defendant filed an affidavit of merits and, also, a claim of set-off.

It is contended by the defendant that he purchased nine bags at 24¢ a pound instead of 30¢ and that they weighed 1650 pounds and not 1984 pounds, and that 132 pounds when delivered were mouldy and unfit for use. It is further the contention of the defendant that he was requested by the plaintiff to file a claim against the railroad company which transported the merchandise from New York to Chicago, and that the plaintiff promised that he would see that the defendant was reimbursed for the difference in the amount and for the loss suffered on the 132 pounds; that as a result of that request and promise on the part of the plaintiff the defendant on March 6, 1917,

paid the plaintiff the sum of $500.00; that that amount is in excess of the value of the merchandise which he, the defendant, received, and the plaintiff has failed to reimburse him for the loss.

It is contended by the defendant, also, by way of a set-off that the plaintiff only shipped him 1650 pounds; that 132 pounds of the merchandise was worthless; that he paid $7.20 freight charges and that the damages to him are $170.42 for which he asks judgment.

The evidence shows, and it is not disputed, that about January 2, 1917, the plaintiff sold to the defendant nine bags of casein, and that certain bags of casein, on January 16, 1917, were delivered to the defendant. There are several matters about the sale and delivery that are in dispute and upon which evidence was introduced. The plaintiff claims the sale was made at 30¢ a pound, and the defendant says, at 24¢ a pound. The plaintiff claims the amount was 1984½ pounds; the defendant claims the gross weight was 1650 pounds and that 132 pounds were unfit. The plaintiff claims that it was shipped by the D.L. & W. Railroad, at New York City, to the defendant, at his risk, and the defendant claims that, though sent from New York City to Chicago, it was not at his risk.

The verdict of the jury, on which judgment for $114.70 in favor of the defendant was entered, was evidently made up of the following amounts; 334½ pounds at 30¢ per pound, making $100.35; $1.15 for freight charges on amount lost, and $13.20 for damages, being at the rate of 10¢ per pound for 132 pounds.

Was the verdict of the jury against the manifest weight of the evidence? According to certain letters, which are un-

paid the plaintiff the sum of $500.00; that that amount is in excess of the value of the merchandise until he, the defendant, received, and the plaintiff has failed to reimburse him for the loss.

It is contended by the defendant, also, by way of a set-off that the plaintiff owes defendant the $250 payment; that $50 pounds of the merchandise was satisfactory; that he paid $1,00 freight charges and that the damages to the rest are $1,00.00 for which he asks judgment.

The evidence shows, and it is not disputed, that about January 8, 1917, the plaintiff sold to the defendant nine bales of sacks, and that multiple bags of sacks, on January 16, 1917, were delivered to the defendant. There are several matters also the sale and delivery that are in dispute and upon which evidence was introduced. The plaintiff claims the sale was made at 30¢ a pound, and the defendant says, at 32¢ a pound. The plaintiff claims the weight was 2000 pounds; the defendant claims the gross weight was 2200 pounds and that 250 pounds were waste. The plaintiff claims shipment was effected by the R. & R. railroad, at New York City, to the defendant, at Ile City, and the defendant claims that, shipment from New York City to Dakota, it was not at his risk.

The verdict of the jury, in which judgment for $125.00 in favor of the defendant was entered, was originally made up of the following amounts: 2000 pounds at 30¢ per pound, making $600.00; $1.15 for freight charges on amount lost, and $13.00 for damages, based on the rate of 32¢ per pound for 125 pounds.

The jury verdict of the jury relieves the defendant of the original accounting in circuit Litigation, which was ob-

disputed, which were offered in evidence, taken by themselves, it would seem that the defendant was liable to the plaintiff for the full amount and that the defendant was of the opinion that his claim for both shortage and damages was against the railroad.

The defendant undertakes, by his own testimony, however, to explain the letters on the ground that he had first made an agreement with the plaintiff, after he has received the casein, which agreement was that, if he, the defendant, would send a check for $500.00, the plaintiff would see that the defendant's claim was collected from the railroad company. The defendant himself testified that the plaintiff requested him to write a letter to the railroad company and put in a claim for damages, stating the condition of the shipment and, further, says that he told the plaintiff that he did not think it was the railroad's fault that the goods arrived in the condition they were in. On March 6, 1917, the defendant wrote a letter to the plaintiff enclosing a check for $500.00 and stating, "As per our agreement today, we herewith enclose check for $500.00 and will be glad to pay you $95.35 just as soon as the claim is settled." "We would appreciate anything you can do to hasten a settlement of this." On the same date, March 6, 1917, the defendant wrote to one Bostick, Agent of the N.Y.C. & St. L. Ry. Co., as follows:

> "We herewith make claim for $114.70 covering loss, damage and freight charges on shipment of Casein (milk curd); freight bill dated 1/6/17.
> The amount shipped was 1984½ lbs. When shipment was received the bags were torn full of holes and contained only 1650 lbs. or a loss of 334½ lbs. We paid 30¢ per pound for this F.O.B. New York City. This would be $100.35 for loss, $1.15 for freight charges on amount lost and we claim $13.50 for damages to 132 pounds.
> Three bags were laid in something wet and green. Your representative came out here and got samples of

dismissed, which were officers in uniform, taken by [illegible], it would seem that the reference was intended to the plaintiff for the full amount was less the difference was of the defendant that his claim for back mortgage and charges was against the railway.

The different undertaken, by the defendant company, whether to maintain the injury on the ground that he had first been an agreement with the plaintiff, after he had received the amount, which agreement was that, if he, the defendant, would lend a check for $800.00, the plaintiff would had that the defendant's claim was satisfied from the railway company. The defendant himself testified that the plaintiff requested him to write a letter to the railway company and put in a claim for damages, stating the condition of the company. Further, that he had told the plaintiff that he did not think it was the railway's fault that the goods arrived in the condition they were in. On March 8, 1917, the defendant wrote a letter to the plaintiff enclosing a check for $800.00 and stating, "In our agreement today, we referred to a claim for $[illegible] that was will be paid to you. [illegible] that be paid on the claim is satisfied." The whole correspondence [illegible] is further a acknowledgment of this." On the same date, March 8, 1917, the defendant wrote to the plaintiff, copy of the [illegible] to, as follows:

"The Dominion Coke Plant for 1916. To overhead Jan. Change and freight charges on shipments of Phenols (with monthly freight bill) [illegible] $[illegible]

The amount delivered was 1[illegible]lbs. Then deducted the monthly [illegible] the bags were worn full of holes and contained only 1[illegible] lbs. or a loss of [illegible] lbs. We paid the [illegible] for this loss. The bill [illegible] $[illegible] for freight charges on account [illegible] $13.80 for charges in bill herein.

Two or bags were held in warehouse [illegible]

this green material. He told us to try and dispose of this before putting in a claim. We have tried our best to do so but have not been successful. We are making claim for 10¢ per pound on this damaged lot, hoping that we may dispose of it some time at 20¢ per pound.

As you know exactly how this shipment was received, we trust that you will give this claim your immediate attention for which we thank you in advance."

On November 20, 1917, the defendant received a letter from one Kearney, Freight Claim Agent, of the Associated Railroads, in answer to the defendant's letter of March 6, 1917, which referred to the defendant's claim for $114.70, which recited that the shipment was received by the carrier in good order and in like condition was delivered to the consignee and requested answers to certain questions in order that the responsibility for the shortage claimed might be determined. Some fifteen months later, on May 30, 1919, the defendant wrote to the plaintiff enclosing a letter which he had received from the Jackson Express Company. In that letter the defendant stated that the railroad company did not reply to his letters and he would like to have the plaintiff get a copy of the expense bill. That letter also recites that the Jackson Express Company, which took the casein from the railroad company in Chicago to the defendant's place of business, failed to make a notation of the receipt when they received the casein from the railroad company. That letter recites, further, that the defendant believes if the plaintiff can get a copy of the expense bill that the defendant will be able to get a settlement within a short time.

It will thus be seen that the letters themselves, without any other evidence, prove that the defendant placed the blame on the railroad company and, accordingly, made his claim for $114.70 for loss and damages against the railroad company. The

this great material. We told us to try and dis-
pose of this before putting in a claim. We have
spent one hour in so we had here not been successu-
ful. We are asking claim for 1d per pound on full
damaged lot, hoping that we may discuss of it some
time at 6d per pound.

As you know recently our this shipment was re-
ceived, we trust that you will give this claim your
immediate attention for which we thank you in ad-
vance."

In December 22, 1917, the Internacional received a letter from the Factory, Trading Claim Agent, of the Americanized Tilly-vado, in answer to the Internacional's letter of March 6, 1917, which referred to the Internacional's claim for 1124.70, which revealed that the shipment was received by the factory in good order and in 1124 condition was authorized by the Tilly-vado and presented another to certain conditions in order that the responsibility for the damaged shipment might be determined. These further months later, on the 27, 1917, the Internacional wrote to the Claim Agent - letter which he had received from the Factory Sales Department. In that letter the Internacional stated that the national company did not really to the letters and he would like to have the Claim Agent see a copy of the expense bill. That letter also realize that the Factory Sales Department, which took the claim from the national company in Chicago to the Factory's plant at Montreal, failed to give a receipt of the receipt when they received the claim from the national company. Then later realize, finally, that the Internacional believe if the Claim Agent see a copy of the expense bill that the department will be able to get a satisfactory claim a quick view.

It will then be seen that the Factory Sales Department, without any other evidence, prove that the Internacional claimed the claim in the material damaged and, accordingly, made his claim for 1124.70 for loss and damage against the national company. The

defendant, however, by his testimony explains the letters in question by testifying that he made his claim against the railroad company at the suggestion of the plaintiff, and the question arises whether his explanation is to be believed in preference to the contention of the plaintiff, that the letters themselves are to be considered as proof that the defendant's claim was against the railroad company and not against the plaintiff.

One Morrison, an employee of the plaintiff, testified that he sold the goods in question to the defendant and saw the shipment after its arrival in Chicago and had a conversation with the defendant after they were received by him. Morrison further testified, "He showed me the goods. Said that they were short of weight. Two of the bags were wet and green; thatis some green substance was on the outside of the bags, looked as though the bags had been set into something green."; that he told the defendant to get an affidavit from the teamster that delivered it and nothing else was said.

Considering the letter of the defendant dated March 6, 1917, addressed to the railroad agent, which recites, "We paid 30¢ per pound for this F.O.B. New York City"and that the testimony of Morrison and the defendant himself as to whether it was F.O.B. New York City or F.O.B. Chicago is contradictory, it would seem as though the determination of the jury that the loss should fall upon the plaintiff was manifestly against the weight of the evidence. Of course, the defendant somewhat stultifies himself when he testifies as he does, that when he made the contract originally with the plaintiff "the price was to be 24¢ a pound" and then when he writes to the railroad agent to make the claim, whether it be considered for himself or for the plaintiff, he says that the amount shipped was 1984½ pounds and "We paid 30¢ per pound for this F.O.B. New York City.

But, the letter of March 6, 1917, which the plaintiff, himself, offered in evidence, contains the words, "As per our agreement today, we herewith enclose check for $500.00 and will be glad to pay you the $98.35 just as soon as the claim is settled. We would appreciate anything you can do to hasten the settlement of this claim." And there is no way of accounting for the words, "As per our agreement today" without referring to the agreement which the defendant testifies he made with the plaintiff. Then, too, the testimony of the defendant that such an agreement was made, is not really denied by the plaintiff. We feel bound, therefore, to conclude, in view of the testimony of the defendant and the striking corroboration contained in the letter of March 6, 1917 that an agreement was made as testified to by the defendant.

There is a procedural contention on the part of the defendant to the effect that as the common law record recites a motion for a new trial and the bill of exceptions does not, the sufficiency of the evidence in support of the verdict cannot be considered here. It is true that the bill of exceptions is the proper document to contain a motion for a new trial. C.B.&Q.R.R. Co. v. Hazelwood, 194 Ill. 69. And, generally, it is the rule that the sufficiency of the evidence supporting a verdict cannot be considered without a motion for a new trial. Metropolitan Discount Co. v. Fitch, 208 Ill. App. 407. Inasmuch, however, as this is a suit of the fourth class in the Municipal Court and the Municipal Court Act (Sec.23) dispenses with the taking of exceptions to the rulings and decisions of the court in such cases, and provides that it shall be the duty of the Appellate Court "to decide such case upon its merits as they may appear from such statement or stenographic report or report signed by

the judge", we are of the opinion that the recitation of a motion for a new trial in the bill of exceptions, in order that the sufficiency of the evidence to support the verdict may be considered, is unnecessary.

As the evidence shows that the defendant paid $500.00 on account, with the understanding that he was to pay the balance of $95.35 when his, the defendant's, claim was settled, and as the evidence shows that no settlement of the defendant's claim, which in the letter to the railroad company is figured at $114.70, was ever made, we are of the opinion that the plaintiff is not entitled to recover the balance of the purchase price, that is the $95.35. Further, as the defendant by his understanding with the plaintiff, made the payment of the $95.35 dependent upon a settlement with the railroad of his claim for $114.70, he, also, impliedly, bound himself to forego the $114.70, if no settlement was made. In our judgment, the two amounts are so nearly equal, that, applying the principle of de minimis non curat lex, it is but just to leave the parties as they are, that is, to consider their respective claims as mutually cancelling each other.

The judgment, therefore, will be reversed and each party will be charged with his own costs.

REVERSED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

the judge", we are of the opinion that the [illegible] of a motion for a new trial on the [illegible] of [illegible], in view that the sufficiency of the evidence to support the verdict may be considered, is unnecessary.

As the evidence shows that the defendant paid [illegible] to plaintiff, that the counterclaiming [illegible] the balance of [illegible] when due, the defendant's claim was settled, and as the evidence shows that no settlement of the defendant's claim, which in the interim the [illegible] amounted to [illegible], was ever made, we are of the opinion that the plaintiff is not entitled to recover the balance of the purchase price, that is the [illegible]. Neither, on the other hand, is the defendant entitled to [illegible] the plaintiff, since the payment of the [illegible] Defendant made a settlement with the [illegible] of the claim for [illegible], and, mutually, [illegible] to [illegible] the [illegible], if no settlement was made. In this judgment, [illegible] it is equally well, then, [illegible] the [illegible] of [illegible]. It is the [illegible] to leave the parties as they are, that is, to [illegible] their respective claims as mutually cancelling each other.

The judgment, therefore, will be reversed and each party will be charged with its own costs.

REVERSED.

[illegible], P.J. and [illegible], J. concur.

458 - 27416

CLARA McMAHON, doing business as MME. SIMCOX,

Appellee,

v.

WILLIAM A. HOFNAUER,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Filed Feb. 16, '23.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 7, 1921, the plaintiff, Clara McMahon, doing business as Mme. Simcox, brought suit against the defendant, Wm. A. Hofnauer, and on the same day filed a statement of claim. The latter recited that the plaintiff's claim was "for money due and owing her by the defendant, to-wit, the sum of twelve hundred and fifty ($1250.00) dollars, for goods, wares and merchandise sold and delivered to the defendant at his special instance and request", etc. The statement of claim further described five woman's gowns ranging from $135.00 to $350.00 apiece, making in all $1250.00. It also alleged that although the defendant was often requested he had failed and neglected to pay the said sum or any part of it despite repeated promises so to do. The statement of claim also contained a count as follows: "Plaintiff further alleges that there is due and owing her by the defendant the sum of $1250.00 on an account stated; that the said account became stated November 1, 1920; that the said defendant has repeatedly promised to pay the said account but has wholly failed and neglected to do so."

Filed Feb. 16,'23.

On February 12, 1921, the defendant filed his appearance and on the 21st of the same month an affidavit of merits, which is as follows:

> "That the defendant is not indebted to the plaintiff for the merchandise, dresses and gowns alleged to have been sold and delivered by the plaintiff to the defendant, for the reason that the said merchandise, dresses and gowns were of poor material and not made of the material contracted for by the defendant with the plaintiff and that the workmanship thereon was of a poor order and the said dresses and gowns did not fit the wife of the defendant and were not suitable for the purposes for which they were made and were of no value whatever to the defendant and his wife was unable to use the same, and that the defendant is not indebted to the plaintiff in any sum whatever."

On February 26, 1921, on motion of the plaintiff, that affidavit of merits was by the court stricken from the files and the defendant ordered to file an amended affidavit of merits in five days. On March 3, 1921, the defendant filed an amended affidavit of merits which is as follows:

> "That the defendant is not indebted to plaintiff for the merchandise, dresses and gowns alleged to have been sold and delivered by the plaintiff to the defendant in the amount and in the sum of $1250.00 as claimed by plaintiff in her statement of claim, for the reason that the said merchandise, dresses and gowns were of poor material and not made of the material contracted for by the defendant with the plaintiff and that the workmanship thereon was poorly done and the said dresses and gowns were misfits and did not fit the wife of the defendant and were not suitable and proper for the purpose for which they were made and were not of a value to exceed $600.00 and the said dresses and gowns were not of a value in excess of the said $600.00; and that the defendant is not indebted to the plaintiff in any sum whatever in excess of $600.00."

On March 9, 1921, on motion of the plaintiff, it was ordered by the court that the amended affidavit of merits "be and the same is hereby stricken from the files", and that the defendant file an amended affidavit of merits in five days.

On January 12, 1951, the Cincinnati Plain Dealer

commented on the idea of the case would be without

of merit, which is as follows:

> "That the reformers in not hesitated to risk
> life for the environment, dreams and young million
> to have been sold and delivered by the liability to
> the defendant, for the reason that the said corporation
> dies, dreams and young vers of your material and not
> each of the material constituted for by the defendant
> with the plaintiff and that the workmanship between
> was of a poor order and the sale dreamer and young
> did not fit the wife of the defendant and were not
> suitable for the purpose for which they were made
> and were of no value whatever to the plaintiff and
> his wife was unable to use the same, and that the
> defendant is not indebted to the plaintiff in any
> sum whatever."

On February 20, 1951, an opinion of the plaintiff,

that artificial material was to [illegible] Plain

Plain and the defendant offered to file an amended petition

of merit in law days. On March 2, 1951, the defendant

filed an amended affidavit of merit which is as follows:

> "That the defendant is not hesitated to risk
> life for the environment, dreams and young million
> to have been sold and delivered by the liability to
> the defendant in the amount and in the sum of $1500.00
> as claimed by plaintiff in her statement of claim, for
> the reason that the said workmanship, dreams and
> young vers of poor material and not each of the material
> constituted for by the defendant with the plaintiff
> and that the workmanship between was poorly done
> and the said dreams and young were suitable the did
> not fit the wife of the defendant and were not suitable
> and proper for the purpose for which they were made and
> were not of a value to amount $1500.00 and the said
> dreams and young millions at a value in excess of
> the said $500.00; and that the defendant is not the
> debtor to the plaintiff in any sum whatever in excess
> of $500.00."

On March 6, 1951, an order of the plaintiff, in

her answer to the court that the amended affidavit of merit

"be and the same is hereby stricken from the files", and

that the defendant file an amended affidavit of merit in

[illegible]

On March 22, 1921, an order was entered reciting that - as the plaintiff had filed an affidavit showing the nature of the plaintiff's demand and the amount claimed to be due and as the cause was a suit for the payment of money, and as the defendant was in default for want of an affidavit of merits - judgment be entered against the defendant by default and for want of such affidavit of merits, and be assessed at $1250. A motion in arrest of judgment was made by the defendant and overruled by the court and judgment entered in the sum of $1250.00, together with costs, in favor of the plaintiff.

Only the common law record is before us, no bill of exceptions having been presented.

It is contended for the defendant that the amended affidavit of merits set up "two separate and distinct partial defenses to plaintiff's statement of claim"; that the dresses were made of poor material, not material contracted for; that the workmanship was poor; that the gowns did not fit; and that their value did not exceed $600.00.

Having only the common law record before us, we are not informed whether the trial judge struck the amended affidavit of merits because it did not in any way disclaim an account stated or for some other reason. It may be that the affidavit was good as to all beyond $600.00, if it had, also, given some sufficient answer to the allegations of an account stated. In American Hard Rubber Co. v. Howe, 280 Ill. 431, the court said, "It is the law, even where formal pleadings are required, that a pleading consisting of several parts, counts or pleas is good if any portion or paragraph thereof sets up

a legal defense or a legal claim." Here, the plaintiff expressly sets up that there is $1250.00 due on an account stated, and that the account became stated on November 1, 1920, and that the defendant has repeatedly promised to pay the account. That should have been answered. The dresses may have been of poor material, or poor workmanship, or both, or of material not contracted for, but if the defendant received them and on November 1, 1920, promised to pay for them, he would be liable on the new promise. Under that count the plaintiff was suing upon a promise to pay an ascertained account. He was entitled to combine the two counts, goods sold and delivered, and an account stated, and an affidavit of merits was not sufficient unless it answered both.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

458 - 27434

JOHN HARKER, Appellant, v. LOUIS KOVALCHICK, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Filed Feb. 16,'23.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, John Harker, having been injured as the result of the collision between a motor cycle, which he was riding, and an automobile driven by the defendant, Louis Kovalchick, brought suit for damages. There was a trial by jury and a verdict finding the defendant not guilty. Judgment was entered upon that verdict and this appeal taken therefrom.

The declaration alleges that on July 16, 1919, the defendant so negligently and carelessly drove his automobile at the intersection of 48th street and Kolmar street that it collided with the motor cycle which the plaintiff was carefully riding and seriously injured him. The ad damnum is $10,000. The defendant pleaded the general issue.

The evidence of the plaintiff is substantially to the following effect: that on July 16, 1919, at eight o'clock, in the evening, he was driving a motor cycle, with one Franck sitting on the rear seat, going south, in between the street car tracks, on Kolmar street; that as he approached 48th street, which runs east and west, he slowed the machine down almost to a stop, looked east and west, saw nothing coming either way, started up,

and just as he did so, saw an automobile coming east on the north side of 48th street. One of the answers of the defendant which recites some of the most important circumstances is as follows: "As I started, like I was saying, he (the defendant) almost come to a stop, just like I. I started up, and as I started up his machine increased speed. The minute I seen that I turned the machine to the left, but the minute I turned to the left I was run into in the front of the machine." He further testified that the collision took place between the two car tracks just north of the center of the intersection; that at the time the collision occurred the motor cycle was going four miles and the automobile about fifteen miles an hour; that he was hit by the front of the automobile, became unconscious and knew nothing until afterwards he found himself in a bed in a hospital, where he remained for 13 days.

The plaintiff, at the time of the occurrence in question was twenty-two years of age, married, a machinists and was receiving wages of $32.65 per week. He had operated a motor cycle for about two years and owned the one he was riding at the time in question.

The evidence of Franek, who was riding with the plaintiff on the rear seat of the motor cycle in question, is to the effect that, while going south on Mobey street and approaching 48th street, when within about ten feet of the latter street, he saw an automobile coming east on 48th street; that as the automobile was seen coming the motor cycle was slowed down, before it reached the car tracks; that the driver of the motor cycle tried to turn to avoid the automobile but the speed of the automobile was increased as it, the motorcycle, turned to the

and just as he did so, was an automobile coming down on the north side of 16th street. One of the occupants of the automobile could hardly have of his own importance determined in an injury: "He's a dancer, like a big spring, so long and slender, and he's a boy, just like I. I started my, motion I started on the middle Interurban speed. The minute I saw that I turned the machine to the left, but the minute I turned to the left I was run into on the front of the machine." The further testified that the collision took place between the 1st and 2nd street of the center of the intersection; that at the moment the motorcycle officers in their sight was going. That girls was in automobile about fifteen miles an hour; that he was hit by the front of the automobile, because unconscious and was nothing until after noon on that Monday in a hospital, where he remained for 13 days.

The plaintiff, at the time of the occurrence is years eighteen years of age, married, a machinists without machine wages or $25.00 per week. He has operated a motor cycle for about two years and never has had an accident or was in danger in consequence.

The witness of Jones, who was riding behind the plaintiff in the rear seat of the motor cycle is unmarried, is 19 years of age, while going with a young woman for entertainment this night, when which was the time of the Lexington accident, was on an automobile moving east at 25-30 miles per hour and was coming the wrong side the street line. The jury is convinced the was driving the direction of the motor cycle driver or line to avoid the automobile but the speed of the automobile was increased to 35, the motorcycle, behind of the

left and then a collision occurred between the front left side of the automobile and the front part of the motorcycle; that the collision took place about the center of the intersection.

The evidence of the defendant is substantially to the following effect; that on the day in question, coming home from work, he was driving a Briscoe automobile, which he owns, east on 48th street; that, when approaching Sobey street, he was going at the rate of ten miles an hour; that as he came near that street he looked north and south and as he got to the street itself looked north again and saw a motor cycle approaching; that it was about fifteen feet away when he first saw it. His exact testimony is as follows: "I saw a motor cycle approaching me, going to hit me. I speeded up the motor to get out of the way." He further testified that the motor cycle struck the rear of his car; that the entrance into the rear seat was damaged, the door, the fender and the axle were bent, also the running board and the top where they were struck; that the motor cycle was going at the time of the collision about forty miles an hour. On cross-examination he testified that he was driving east on the south side of the street about four feet from the curb; that at the time of the collision he was going about ten miles an hour; that he put his foot on the accelerator when he saw the motor cycle was going to hit him.

There were four other occurrence witnesses who testified. Hroner, an automobile mechanic, who was in an automobile which he was driving and which was behind the defendant's automobile on 48th street, testified that when the defendant's automobile reached Sobey street it was slowed up a little. His exact testimony is to the effect that "he was on the left hand side of the street at 48th street just then a motor cycle approached. In-

left and then a multiple accident involving the [illegible] man of the automobile and the front part of the motorcycle; what the collision took place about the center of the intersection.

The evidence of the defendant is substantially to the following effect; that at the day in question, coming home from work, he was driving a Ford automobile, which he owns, east on 42nd street; that, when approaching Perry avenue, he was going at the rate of ten miles an hour; that as he came near that avenue he looked north and south and on to get to the street light and looked north again and saw a motor cycle approaching; that it was about fifteen feet away when he first saw it. His answer continues in the following: "I saw a motor cycle approaching me, going to left me. I speeded up the motor to get out of the way." He further testified that the motor cycle struck the rear of his car; that his automobile left the rear left was damaged, the door, the fender and the mule were bent, also the running board and the tire of the wheel already. That the motor cycle was going in the line of the railroad. Then they either go forward. On cross-examination he testified that he was driving west on the south side of the street about four feet from the curb; that at the time of the collision he was going about ten miles an hour; that he put his foot on the accelerator when he saw the motor cycle was going to hit him.

There were four other witnesses who testified. Brown, an automobile mechanic, who was in an automobile which he was driving and which was behind the defendant's automobile on 42th street, testified that the defendant's automobile changed lanes slowly and turned up a little. His evidence tends to the effect that the car on the left hand side of the

stead of making a right turn he made a left turn and crashed right into the motor cycle" and threw the man sitting on the rear seat of the motor cycle behind the automobile; that the collision occurred near the north crossing; that is, on the north side of the intersection, about 5 feet from the north line of the intersection of the streets, about in the center of the car tracks; that the front part of each machine collided. He further said that he made an inspection of the automobile and found the left front fender was smashed in and the rear door on the left side also smashed in; that at the time of the collision the motor cycle was going 8 miles an hour and the automobile 10 miles an hour; that the man in the automobile was going east on the left hand side of the street. His testimony is as follows: "When the motor cycle was hit, that is, when he made the left turn, the man driving the automobile, he also made a left turn and the force hit this here machine, spun the machine around and the motorcycle hit it in the rear, made a complete turn facing the machine west, meaning the automobile, that in the turn, the motorcycle struck the left rear door; that at the time of the collision he was about 75 feet behind the man driving the automobile.

Havlicek, department manager of the Depositor's State Bank, says that his attention was attracted to the motor cycle going south by the noise; that it was going between thirty and thirty-five miles an hour, and that the collision occurred a second or two after he saw it going at that speed.

Ulrichs, who was sitting in front of 4739 Hobey street, where he lived, testified that the motor cycle was driven up and down between 47th and 48th street on Hobey street from 35 to 40 miles and hour. He intimates that they were show-

place of making a right turn he made a left turn and crossed right into the motor cycle" and thereby was driving on the near side of the motor cycle behind the automobile; that the collision occurred near the north crossing; that it, on the north side of the intersection, about 8 feet from the north line of the intersection of the streets, about in the center of the car tracks; that the first part of such machine collided, Mr Threlkeld could that he made an inspection of the automobile and found the left front fender was crushed in and the rear part on the left side also smashed in; that at the time of the collision the motor cycle was going 8 miles an hour and the automobile 10 miles an hour; that the car in the automobile was going east on the left hand side of the street. His testimony is as follows: "When the motor cycle met me, that is, when he made the left turn, the man driving the automobile, he did not make a left hand turn but then my car was hidden. From the motor vehicle passed the motorcycle hit it in the rear, made a complete turn-over the machine rest, smashing the cycle. That in the turn, the motorcycle struck the left rear door; that at the time of the collision he was about 75 feet behind the man driving the automobile.

Bevilack, department manager of the Department's Chain Shop, says that his attention was attracted to the motor cycle going south by the noise; that it was going between thirty and thirty-five miles an hour, and that the collision occurred a second or two after he saw it going at that speed.

Dritsas, who was driving in front of 6750 Bishop street, where he lived, testified that the motor cycle was driven up and down between 67th and 69th streets on Bishop street from 35 to 40 miles and hour. He indicates that they were going

ing how fast they could go. He also intimates that when the motorcycle made the trip just prior to the collision it did not stop north of 48th street.

The evidence of Wojinski is that he was in front of 4758 Hobey street, where he lived; that he saw the motor cycle was coming fast and saw it strike the automobile and turn it round.

Mrs. Stober testified that the motor cycle ran into the automobile and turned it round so that it faced west.

The witness, Joe Kalla, who was on the front porch of 4752 South Hobey street, where he lived, testified that the motorcycle 100 feet before it reached 48th street, was going from 50 to 55 miles an hour; that the automobile was going slower; that the motor cycle hit the automobile near the rear door.

The witness Kalafut, who lived at 4756 Hobey street, who was standing on the northwest corner of Hobey and 48th streets, testified that the motor cycle was coming very fast on the right hand side of Hobey street; that the automobile was going pretty slow.

The evidence, of course, is irreconcilable. If the jury had believed Kroner and the plaintiff and Franek, a verdict for the plaintiff might have seemed a reasonable one. The plaintiff's testimony, if believed, shows care. Then, too, if the jury believed Kroner, that the defendant made a left turn, instead of a right turn, and was going ten miles an hour and the motorcycle eight, it might be justified in finding the defendant guilty of negligence. The testimony of Ulricks was denied by both the plaintiff and Franek. Kroner's testimony, considering his position, that it was naturally incumbent upon

ing law that they could do. He also explained that when the motorcycle model the ship just prior to the collision it did not obey small or some errors.

The evidence of Wallenberg is that on one in front of 4928 Ocean Avenue, where he lived, that he saw the motor cycle was coming fast and saw it strike the automobile and turn it over.

Mrs. Pauline testified that the Ford Sedan was hit the motorcycle and driven it front of it fifty feet.

The witness, Joe Kolin, was on the first floor of 4928 North Ocean Avenue, where he lived, testified that the motorcycle hit that motor; it rounded 4928 street, was going from 30 to 40 miles an hour; that the motorcycle was going slower; that it never slowed all the motorcycle have its own power.

The witness Zaharis, who lived on 4928 North Ocean Avenue, who was standing on the sidewalk opposite of house and 4928 Avenue, testified that the motor cycle was driving very fast as he saw it coming down the street and the motorcycle was going very slow.

The evidence of Morton, is irrevocable. If the jury had believed Jerome and the Pauline and Frank, a verdict for the plaintiff might have rendered a reasonable one. The plaintiff's testimony, if believed, alone only. Then, the if the jury believed Jerome, that the defendant made a left turn, instead of a right turn, and was going ten miles an hour and the motorcycle might, it might be negligence in finding the defendant guilty of negligence. The testimony of Jerome was denied by both the plaintiff and Frank. Jerome's testimony

him, driving an automobile just back of the defendant, to observe the directions and motions of those in front of him on the same street, is quite strong. But there is the contradicting evidence of the defendant, Kella, Havlicek, Ulrichs, Kalafut and Wojinski. Ulrichs says the motorcycle had been driven up and down Robey street north of 48th street at 35 to 40 miles an hour, that they were showing how fast they could go and that finally, going south, they did not stop at the intersection. Wojinski says the motorcycle was coming fast. Havlicek says 30 to 35 miles an hour. Kella says it was going from 50 to 55 miles an hour before it reached 48th street. Kalafut says that it was coming very fast and that the automobile was going pretty slow. And even the evidence of the plaintiff, himself, suggests that both drivers knew of the presence of the other, and that the defendant almost came to a stop as the plaintiff entered the intersection.

The situation may have been one akin to that in Campbell v. Chicago City Ry.Co., 212 Ill. App. 344, where it was a question of which driver should give way. Taking an impartial view of what the record here presents, and, at the same time bearing in mind the great advantage, we are bound to assume the jury had in seeing and hearing all the witnesses, and realizing, as we must, that the justice of the case hangs almost entirely on the determined credibility of the witnesses, we do not feel that it would be reasonable for us to hold that the verdict for the defendant was against the manifest weight of the evidence.

It is contended that error was committed in giving thirty-one instructions, that they confused the jury to the injury of the plaintiff's cause. No specified errors in the instructions are pointed out. Rasar & Johnson v. Spurling, 184 Ill.

Now, driving an automobile just back of the intersection, he observe the directions and actions of those in front of him on his good right, or quite obvious. Not there is no reasonable ion evidence of the defendants, Vida, Brighton, Stiles, Sim- ms and Wolfardt. Witnesses says the occupants had been drinkin ng and some body stated north of 40th at 60 to 65 miles an hour, that they were driving and that they went up and that finally, going round, they did not stop at the intersection. Witness says the motorcycle was coming fast. Defendant says 30 to 35 miles an hour. Kelly says it was going from 50 to 55 miles an hour before it reached this point. Defendant says that it was coming very fast and that the motorcycle was going pretty slow. And from the evidence of the plaintiff, himself, suppose that both drivers knew of the presence of the other, and that the defendant minor came to a stop as the plaintiff entered the intersection.

The question may have been one only to rest in Campbell v. Chicago City Ry., 231 Ill. 310, 324, where it was a question of which driver should give way. Taking an impartial view of what the record here presents, and, at the same time bearing in mind the great advantage, we are bound to assume the jury had in seeing and hearing all the witnesses, and testifying, as we want, that the jurisdiction of the case lungs almost entirely on the determinate credibility of the witnesses, we do not feel that it would be reasonable for us to hold that the verdict for the defendant was against the manifest weight of the evidence.

It is contended that error was committed in giving thirty-one instructions, that they confused the jury to the injury of the plaintiff's cause. To specified errors in the in-

Ill. App. 357; Mather Electric Co. v. Matthews, 47 Ill. App. 557; Razor v. Razor, 39 Ill. App. 527. We have read the instructions, and, although there is some duplication, and taken as a whole they are unnecessarily voluminous, we do not feel justified in holding that the giving of them, considered just as a matter of quantity, constituted such error as justifies a reversal.

The judgment therefore will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

318 - 27276

E. J. LENNARTZ,
Complainant and Appellee,

vs.

JOHN T. BODDIE et al.,
Defendants.

On Appeal of THOMAS C. HINDMAN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant seeks to establish the right to redeem, as stated in Lennartz v. Boddie, 304 Ill. 484.

In the foreclosure suit of Biscoe Hindman v. Charles D. Off et al., a decree was entered December 12, 1918, finding due to complainant $18,956.24 and solicitor's fees and costs. Within the period of redemption John T. Boddie, holder of a judgment against Off, deposited the full amount necessary and received a redemption certificate. Subsequently Lennartz, who had acquired title to the premises, attempted to redeem but was unsuccessful. April 21, 1920, the master sold the premises at public sale pursuant to the decree, and Boddie being the highest bidder for cash the property was sold to him and the master's deed issued and recorded. Subsequently Boddie executed a deed conveying the premises to Thomas C. Hindman. By the present bill complainant Lennartz seeks to have the alleged redemption by Boddie and the deed of the master issued thereunder declared null and void and all rights of the defendants in the premises terminated; also asks the court to find that complainant tendered to the master the amount due and is entitled to redeem upon payment to Biscoe Hindman of the proper

amount found due upon an accounting. A decree was entered finding the facts substantially as alleged in the bill and that Leonarts had the right to redeem. Thomas Hindman seeks by this appeal to have the decree reversed, and we are of the opinion the record requires that this be done.

The original foreclosure proceeding in Hindman v. Off was under the statute in force July 1, 1917, which provided that the sale shall be after the expiration of fifteen months from the date of the first certificate of indebtedness. (Illinois Laws 1917, Callaghan, pages 1193 to 1198). The decree provided with reference to the rents accruing in the hands of the receiver that "after confirmation of master's report of sale, in case any deficiency is shown in the amount due complainant, he shall be entitled to a deficiency decree against Off, and an execution shall issue thereon as on other judgments, and such deficiency decree shall be a lien upon the rents, issues and profits arising out of said premises, collected by the receiver theretofore appointed herein." The decree also provided that the master in chancery should forthwith issue a certificate of indebtedness to Biscoe Hindman which, if not paid within fifteen months, the master should thereupon sell said premises at public sale to satisfy the said certificate of indebtedness or the last recorded certificate of redemption.

September 16, 1917, a receiver of the premises was appointed who continued in possession, collecting rents until March 25, 1920. November 26, 1919, without notice to Off and without his consent, an order was entered directing the receiver to pay to Biscoe Hindman $4644.20 on account of the indebtedness due to him. Subsequently Off moved the court to set aside this order on the ground that he was the owner of the equity redemption during most of the time the receiver had accumulated this money

from rents and asked that Biscoe Hindman be ordered to pay this sum back to the receiver, to be held until the property had been sold, and that if there then should be no deficiency the larger part of said sum should be ordered paid to Off. This motion was continued and, so far as the record shows, was never acted upon and is still pending.

The order directing the receiver to pay this sum to Biscoe Hindman was void as not within the power of the court to enter. The decree definitely contemplated that the receiver should hold all the rents and profits from the premises until the confirmation of the master's report of sale; that if then there should be a deficiency decree it should be a lien upon such rents in the receiver's hands, but if there was no deficiency the accumulated rents should be turned over to the owner or the owners of the equity redemption as their interest might appear. The sale took place April 21, 1920, for sufficient to pay the mortgage indebtedness in full. There was no deficiency, but there was a slight surplus. Under such circumstances the debt due Biscoe Hindman was satisfied in full and he is not entitled to an additional payment from the rents collected during the period of redemption. All his rights terminated in his deed, and the owner or owners of the equity redemption were entitled to all the rent and profits accruing during the period of redemption. Haigh v. Carroll, 209 Ill. 576; Lightcap v. Bradley, 186 Ill. 510; Sheppi v. Bartholomae, 217 Ill. 105.

Complainant, Lennartz, in the instant suit attacks the redemption by John T. Boddie as collusive, fraudulent, the result of a conspiracy and void, and the chancellor so found. March 8, 1920, John T. Boddie loaned Charles D. Off $1,000, taking his judgment

Then Doyle had asked that Bloose Hanlon be ordered to pay him one hundred on the judgment, if he did not pay the complete and final sum, and then if there then should be no deficiency the larger part of said sum should be ordered paid to GTT. This motion was considered and, as far as the record shows, was never acted upon and is still pending.

The order directing the payment to pay this sum to Bloose Hanlon was void as was also the order of the court to enter. The future sufficiency proceedings then in progress should stand all the order but certain from the previous until the termination of the matter's course of action, that is that there should be a deficiency decree if warranted by a lien upon such funds in the receiver's hands, but if there was no deficiency the accumulated funds should be turned over to the owner of the equity of redemption as their interest might appear. The case took place April 21, 1890, for sufficient to pay the mortgage indebtedness in full. There was no deficiency, but there was a right surplus. Under such circumstances the fact the Bloose Hanlon was entitled to full and he is not entitled to an additional payment then the funds allowed during the period of redemption. In the right surplus retained in the fund, so the order as shows it the right redemption was entitled to all the rent and profits accruing during the period of redemption. Dalton v. Bartell, 74 Ill. 499; Lighner v. Keyes, 124 Ill. 158; Tuttle v. Jackson, 117 Ill. 529.

Appellant, Jackson, is the bright and strong in protection of Jane T. Doyle as guardian, trustee, the trustee of a secretary and void, and the commission as found. Aaron v. Long, 126 Ill. Doyle Lines Service v. Ind Il.444, Walter Ill. Jackson

note therefor due one day after date. March 10, judgment by confession was entered thereon in the superior court of Cook County and the following day an execution given to the sheriff, who levied on the premises in question. Boddie thereupon deposited with the sheriff $17,262.31, the amount due under the certificate of indebtedness issued in the foreclosure suit to Biscoe Hindman, and the sheriff issued to Boddie a certificate of redemption. The statutory period of redemption expired March 12, 1920, and the master in chancery who issued the first certificate of indebtedness duly advertised the property for public sale, which took place April 21, 1920, when, pursuant to the notice, Thomas T. Boddie being the highest and best bidder for cash, the property was sold to him for $17,600. Report of sale was duly made by the master, and after due notice to all parties in the foreclosure suit it was approved by the court April 27, 1920, and a deed issued to Boddie. Subsequently Boddie conveyed the premises by deed to Thomas C. Hindman.

April 18, 1919, Off conveyed his equity of redemption to Charles T. Knapp. This conveyance made no assignment of Off's interest in the rents. October 21, 1919, Knapp conveyed the equity to E. J. Lennartz, the complainant in this suit, and at the same time Knapp made an assignment to Lennartz of all the rights of Knapp in and to the rents collected "heretofore and to be collected hereafter" upon the discharge of the receiver. Lennartz says that March 12, 1920, he attempted to redeem but the master refused to issue a certificate of redemption to him.

It is urgently argued, with a mass of detail which we have noted but which is too complex and extended to repeat in this opinion, that Biscoe Hindman, Thomas Hindman and John T. Boddie wrongfully caused a collusive judgment to be obtained against Off for the purpose of preventing Lennartz from redeeming the premises. There may be some ground for suspecting collusion

from the fact that Biscoe and Thomas Hindman are brothers and that Boddie in lending $1,000 to Off was acting for Thomas Hindman, who also furnished to Boddie the money with which the redemption was made. While Biscoe Hindman was in California at the time of these transactions, it appears he loaned the necessary funds to his brother Thomas, although there is evidence that Biscoe Hindman had no wish to obtain the property and was interested only in recovering the amount due him. While these circumstances, and others which we have considered, gave some ground for argument against the good faith of the redemption by Boddie, yet the salient determining fact remains, namely, that Off did receive $1,000 from Boddie and gave Boddie his note for the same; that the note matured and judgment was confessed according to its terms.

That the parties engaged in this transaction purposely, pursuant to a plan and with the expectation of profit, does not make the transaction fraudulent. Business deals usually contain these elements and properly so. We cannot agree with the conclusion of the chancellor that there was any taint in this transaction which renders it invalid.

It has been repeatedly held that a redemption by a judgment creditor of the owner of the equity redemption is valid. Schroeder v. Bauer, 140 Ill. 135; Davenport v. Karnes et al., 70 Ill. 465; Garden City Bank Co. v. Christley, 280 Ill. 617; Kerr v. Miller, 259 Ill. 516; Strauss v. Tuckhorn, [illegible] Ill. 73.

The redemption proceeded in strict compliance with section 38 of the Statute on Judgments and Decrees as it then was. Callaghan's 1917 Law Statutes, page 1195.

As the judgment was based upon a real indebtedness the judgment creditor is entitled to redeem, and if he does so in the manner prescribed by the statute such redemption is good.

These salient facts appear from the record, and we are of the opinion that the redemption by Boddie was pursuant to law and valid.

Complainant, Lennartz, introduced testimony to support his claim that March 17, 1920, which was the last day of the period of redemption, he appeared before the master and tendered the amount due for the purpose of redeeming the premises. The master, a disinterested party, testified that no tender was made; that Lennartz and his two friends who called upon him merely inquired as to what it would cost to make the redemption and were told that a computation would have to be made before this could be answered. The master also informed them that a redemption had already been made through the sheriff. Lennartz and his witnesses do not say that any tender of the full amount of the indebtedness was made, but claim to have offered at most $12,800, which they say added to the amount of $4644.2[illegible] paid to Biscoe Sindram by the receiver under the order of the court on November 26, 1919, makes the full amount necessary to redeem. We have held that the court had no power to enter such an order and it was void. It necessarily follows that Lennartz could not receive the benefit of this payment to piece out the shortage in his alleged tender.

It is further suggested with pertinency that the alleged tender to the master of a less amount than his record showed to be due is not a sufficient tender; for such officer must have sufficient opportunity to examine and determine what is tendered and what is the actual amount due.

The prior redemption of Boddie was a bar to this alleged attempt by Lennartz to redeem. Under the statute then existing, section 18, the owner of the equity of redemption had twelve months from the date of the certificate of indebtedness to

redeem, or fifteen months if there should be no redemption by a judgment creditor; and by section 25 it was provided that after the expiration of the twelve months and within the fifteen months a judgment creditor may redeem. As we have said, Lennarts's attempt was upon the last day of the fifteen months, and as there had already been a valid redemption by Boddie, his attempt to redeem was unavailing.

Many points have been presented which we have not commented upon in this opinion, and also cross errors which it is not necessary to discuss. The salient point in the controversy is the bona fides of the indebtedness of Off to Boddie for which judgment was entered. As we view the record this was established and the validity of the redemption by Boddie follows. The complainant has not proved his allegations, and the decree is reversed and the cause remanded with directions to dismiss complainant's amended and supplemental bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever and Matchett, JJ., concur.

redeem, or Tiffany would if it were should be on consortium by a Delaware corporation and by meaning, so it was created this "fine the existence of the Tenths Junior and which the Tiffany owning a Delaware corporation may redeem. It is here said, Lancaster's lawyer was upon the last day of the fifteen months, and he there had already been a valid redemption by Bellis, his attempt to redeem was unavailing.

Many points have been presented which we have not mentioned upon in this opinion, and also cases which it is not necessary to discuss. The material point in the controversy is the Zero Plan of the underwriters of 1917 in Bellis for which judgment was entered. As we view the record this was established and the validity of the redemption by Bellis failed. The appellant has not proved his allegations, and the decree is reversed and the cause remanded with directions to dismiss complainant's amended and supplemental bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Chief Justice Gummere, Mr. Justice.

18 - 27571

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM BIOFF,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

223 I.A. 635

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with the crime of pandering in that on January 14, 1922, he unlawfully received $30 from Bernice Thomas, alias Rose, part of her earnings from the practice by her of prostitution. Upon trial by the court he was found guilty and sentenced. The abstract does not show the punishment imposed.

It is first argued for reversal that the court committed error in admitting incompetent evidence, but in what particulars is not specified in the argument. The alleged errors referred to are not sufficient to cause a reversal, as the case was tried by the Judge, who, presumably, would not be influenced by incompetent evidence, if any. We hold, however, that it was competent to receive evidence as to the character of the premises where the occurrence in question took place.

The evidence shows that the premises at 216 South Halsted street, in Chicago, consist of a bar-room in front and immediately back of it is a building known as 210 South Halsted street. No. 216 is connected through the rear door and a gangway or covered shed with No. 210, which, as the evidence shows, was a house of prostitution.

The defendant claims that he was employed as a bar tender in the saloon and had no connection with anything going on in the building in the rear. However, it is sufficiently proven

that the prostitutes occupying No. 210 would give their earnings to John Young, who had charge of this building and who testified that he gave the money to defendant pursuant to instructions he received when he was employed for this work. Young particularly testified that he did this in the case of the money received from Bernice Thomas, and it is proven beyond any doubt that the money she gave Young, which he in turn gave to defendant, was from her earnings as a prostitute.

The record amply supports the charge and no sufficient reason has been presented to find to the contrary. The judgment is therefore affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

that the investigation undertaken by, did result give their their questions to John Jones, who had always at life building and the investigations that he gave him money in industrial research to investigations as required when he was employed for this work. Young realizing that building the 1st day of the week of the money received from Darwin Jones, and it is proven beyond any doubt that the money who gave Young, which he in turn gave to defendant, was free for working as a receiver.

The second count charges the defendant and he criminally reason has been proven that in fact is the contrary. The language is therefore sufficient.

CONCLUSION.

Dated and filed this, 17., January.

187 - 27663

MARTIN HAUSLER, SR.,
Appellee,

vs.

EASTMAN A. BURROWS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against him for $1276.33 entered in a suit upon a promissory note made by defendant to the order of plaintiff. Defendant filed an amended affidavit of merits, which, on motion, was stricken from the files and judgment was entered against him by default for want of an affidavit of merits.

June 23, 1922, on motion we struck the bill of exceptions from the record, so there is before us only the statutory or law record. It is well settled that motions and orders striking pleas from the files should be preserved by bill of exceptions and cannot be part of the record otherwise. Mann v. Brown, 265 Ill. 394; Harmon v. Callahan, 286 Ill. 59.

As the alleged error of the trial court is not properly preserved for review we must affirm the judgment. Gaynor v. Hibernia Savings Bank, 166 Ill. 577; Jones v. Roberts, 188 Ill. App. 609.

The judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

206 - 27682

M. C. FINLAYSON and ALBERT ANIS, Lately Copartners Trading as FINLAYSON COMPANY, Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
HARRY W. OVERMAN, Appellant.	

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against him of $1553.94.

Counsel in their briefs have improperly given the title of this case by transposing the position of plaintiffs and defendant respectively.

The trial court struck defendant's affidavit of merits and plea of set-off and entered judgment by default against defendant for want of an affidavit of merits.

There is no bill of exceptions in the record before us.

It is well settled that motions and orders striking pleas from the files should be preserved by bill of exceptions and cannot be made part of the record otherwise. Mann v. Brown, 263 Ill. 394; Harmon v. Callahan, 286 Ill. 59.

As the alleged error of the trial court is not properly preserved for review, we must affirm the judgment. Gaynor v. Hibernia Savings Bank, 156 Ill. 577; Jones v. Roberts, 188 Ill. App. 609.

AFFIRMED.

Dever and Matchett, JJ., concur.

215 - 27691

JOHN WIESZCHOWSKI, Administrator of the Estate of Veronica Stankiewicz, Deceased,

Appellee,

vs.

WILLIAM G. BELL,

Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

220 I.A. 334

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

At about eleven o'clock on the evening of April 22, 1919, while Mrs. Veronica Stankiewicz was crossing Milwaukee avenue, Chicago, she was struck and killed by defendant's automobile which he was driving. The administrator of her estate brought suit for damages and upon trial had a verdict and judgment against defendant for $4,000, from which he appeals.

Milwaukee avenue runs from southeast to northwest, where it intersects with Robey street, which runs north and south, and also intersects at this point with North avenue, which runs east and west. The northwest bound Milwaukee avenue street cars run on the easterly track and the southeasterly cars on the westerly tracks. Decedent at the time of the accident was thirty-six years of age and was employed for some three years before as scrub woman in an office building down town. On this evening she, with other women employed at the same place, after they finished work, left down town for home on a northbound Milwaukee avenue street car. On arriving at Robey street the car stopped at the usual place to permit passengers to alight, and a number of persons, including the decedent, alighted from the rear of

10. Possibles Public Services
Utilizing the Library of the Future.

As Alpha Alpha's plans to the meeting of April 20, 1970, with Mrs. Theodore Hamilton was presiding (Monday-Day, Chairman, Mrs. Wm. Winn) and attended by Mrs. Hamilton's delightful which he was invited. The administrator of our whole branch mail for changes and some little had a trivial and judgment members members for 1970. Time would be wasted.

Alpha Alpha Alpha Tau Omega Sorority is notorious, whole it interacts with Tommy Atkins, which some month and month, and also interacts of this point with Alpha Alpha Omega, will time what not was. The activities Social Chairman Mrs. Wm. Winn was on the monthly Dance and the sorority with in the weekly Dance. Members in the time of the meeting was time. All plans of our not was replaced the Alpha Alpha Alpha Omega sorority to be office building Alpha Alpha. In this meeting, with other women employed at the same place, after they finished work, left Alpha Alpha for home on a northbound streetcar around eleven and. In writing at Alpha Alpha the six minutes of the social time in Phoenix Pittsburgh is -11:15, and a number of parties, including the Mayoress, arrived from the year of

the street car and started westerly across Milwaukee avenue going towards Robey street. Defendant, driving his automobile southward on Milwaukee avenue, struck decedent, inflicting the injuries from which she died.

The questions of negligence are the only ones argued. There is controversy as to whether decedent was crossing at the Robey street crossing or fifty feet south of it. Because of the diagonal intersections of the streets at this point it is evidently difficult to place the crossing accurately. It is a reasonable conclusion that decedent was crossing Milwaukee avenue along the line where pedestrians usually cross in going towards Robey. An eye-witness of the occurrence, who did business on this street and was acquainted with the neighborhood, testified that the decedent was at the place "where the people cross the street *** that is a walk over across the street used by the people commonly; I have been using it myself for a good many years." This was evidently a fair minded and distinterested witness.

The jury properly could believe that when she started to cross Milwaukee avenue decedent was with a number of people, at least ten of them walking ahead of her and others walking behind her, and that they were walking on the customary crossing; that decedent looked towards the northwest on Milwaukee avenue before she started out from behind the street car; that defendant was driving his car southward at the rate of about twenty-five miles an hour. Witnesses say they heard no horn. The lights of the automobile are described as "two small lights." Some say they noticed no headlights. The automobile evidently came upon the group, going fast, without warning, and suddenly, for several of the persons who were crossing testified that it

the sixties are not divided precisely among distinct groups
anti-inverts being scarce. Nevertheless, giving his attention
exclusively to Victorian issues, Bruce Bawcutt, initiating the
Salutiria view which are cited.

The questions of negligence are the only one
argued. There is controversy as to whether Jacobus was crossing
the at the lower street crossing or fifty feet south of it.
Because of the flagrant inconsistency of his attitude at this
point it is evidently difficult to give the crossing com-
plete. It is a reasonable conclusion that Jacobus was crossing
the intersection before that the Blue Goose probably could easily
have to make between them. In consideration of the concurrence,
the jury instructed as this answer not was appropriate with the
circumstances, justified that the jurisdiction was in the Blue
Goose. The jurisdiction before the street not that is a well area
the street used by the people commonly; I have been going it
would for a good many years." This was evidently a fact
minded and distinguishing answer.

The jury properly could believe that Jacobus was
alarmed to speed Blue Goose driver driver not will a number of
people, at least two of them witnesses, stood at far not where
walking toward her, and that they were calling to the driver
strongly that therefore Daniel Bonnoro the continued in driving
motion before was starting not that behind the street that that
Bellaiano was taking the car motioned at the side of about
twenty-five. Life so here. Witnesses say that based on lamps.
The lights of the automobile were described as "two small lights,
does not very seldom as headlights. The Lamborghia evidently
came upon the group, noisy fast, tilted vehicle, and without,
for several of the persons who were speaking realizing that it

was necessary for them to jump quickly out of its pathway.

The questions of contributory negligence of the decedent and the negligence of the defendant were properly left to the jury, and we cannot say that the evidence does not justify the conclusion that the accident was caused by the negligence of the defendant while decedent was in the exercise of ordinary care for her own safety.

A number of cases involving accidents somewhat similar to this have been cited, but, as we have said elsewhere, accidents of this kind, while similar in general respects, differ in some vital particulars, so that the decision in one case cannot be considered as applying to all such cases.

The judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

224 - 27700

THE CRAWFORD DEPARTMENT STORE, a Corporation, Appellee, vs. D. PETERSON WEBNER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of an adverse judgment upon a verdict in an action of forcible detainer for the possession of the store and basement at 4022 West North avenue, Chicago.

Defendant was a tenant of the premises by lease from A. N. Greenberg, the owner, which expired October 31, 1921. The Crawford Department Store, plaintiff herein, was also tenant from the same landlord, of the adjoining premises at 4024 West North avenue, and its lease contained an option for a lease on number 4022 from November 1, 1919, at $100 a month, upon the same terms as contained in the lease of number 4024. By agreement this option was extended to November 1, 1921, provided the tenant, the Crawford Department Store, exercised this option by May 1, 1921. April 28, 1921, it duly exercised its option by serving the proper written notice, and paid to Greenberg the rental for the premises in question for the month of November, 1921.

Defendant claims that some time in June, 1921, Greenberg gave him verbal permission to remain in the premises, after the expiration of his lease on October 31, 1921, until May 1, 1922.

Greenberg denies he made such a verbal extension. The testimony, however, of defendant tends to prove no more than this - that when he spoke to Mr. Greenberg concerning permission to remain on the premises after his lease expired, Greenberg said he might remain provided he could "fix it up with the Crawford Department Store." This amounts to no more than referring defendant to the new lessee of the premises.

In any event, when plaintiff exercised its option with Greenberg it became his lessee and entitled to possession and Greenberg had no right of possession which he could grant to defendant. The only party entitled to possession was the plaintiff, The Crawford Department Store, and the judgment was right and is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

Dramatic Policy be made such a verbal nonsense. The testimony, however, of Coleridge tends to prove we have thus lost - this also he spoke to us. Dramatic nonsensical paradoxes is remark in the peculiar edge his large minded, Wordsworth said he might usually predict to which "Pit" is he with the Contract Development Plans." This answer is in more than interesting situated in the new Jewel of the province.

In any event, when plaintiff exercised his option with regarding to Indian Lake and motion to possession and Development Bid on point of Development Plan to which point it declined. The will only utilized in accordance the [illegible] [illegible]. The Provincial Development Plans, and the Judgment are also not to utilized.

ATTORNEY,

Sharp and Baldwin, Jr., Esquire.

276 - 27752

SAM BARTOSH,
Appellee,

vs.

EUGENE BRASLAWSKY et al.,
On Appeal of THE RUSSIAN AMERICAN
BUREAU, a Corporation, et al.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE McGURKIN

DELIVERED THE OPINION OF THE COURT.

By this appeal Eugene Braslawsky and the Russian American Bureau, a corporation, seek the reversal of a judgment against them for $90.53.

It is first said that the court found against the Russian American Bureau only, but the clerk erroneously entered the judgment against the defendants Braslawsky and the Russian American Bureau. The record does not justify this assertion. It there appears that the court found against both defendants and the proper judgment was entered, pursuant to the finding. We cannot inspect the bill of exceptions as to the form of the finding, for this has no proper place except in the law record. Curran v. Foley, 67 Ill. App. 543.

Argument is made touching the evidence, but we are of the opinion that this appeal must be dismissed for the reason that the judgment was against two defendants, but apparently only one prayed and was granted an appeal - which one does not appear from the record. The appeal bond filed recites a judgment against only one defendant.

The judgment against two defendants was joint and no several appeal was prayed for or allowed. Hammond v. The

People, 164 Ill. 455.

The appeal will therefore be dismissed.

APPEAL DISMISSED.

Dever and Matchett, JJ., concur.

7136.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. A. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

C. E. Russell, L. B. Russell, B. B. Russell, C. E. Russell, Jr., Malcolm Cobb, doing business under the firm name of Russell Brothers & Cobb, Appellants,	)	
vs.	)	Appeal from the Circuit
The Milford Canning Company, a corporation, Appellee.	)	Court of Iroquois County.

Jones, Presiding Justice.

The appellants, C. E. Russell, L. B. Russell, B. B. Russell, C. E. Russell, Jr., and Malcolm Cobb, doing business under the firm name of Russell Brothers & Cobb, began suit in the circuit court of Iroquois County against the appellee, The Milford Canning Company, a corporation, to recover $1493.77 alleged to be due appellants from appellee for 43.78 acres of corn at $34.12 per acre. There was a trial by jury, a verdict for $784.76, being for 23 acres of corn at $34.12 per acre, and from the judgment rendered upon that verdict this appeal was prosecuted.

On March 12, 1921, the appellants and the appellee entered into a written contract wherein appellants agreed to plant for the appellee 465 acres of sweet corn during the season following the date of the contract. This corn was to be planted on the exact days agreed upon at the time of closing the contract, provided soil and weather conditions would permit. Should conditions make it impossible to plant on the days specified, another date was to be agreed upon. The appellants were to bear all expense of preparing the soil, planting, cultivating, harvesting, and delivering the corn to the factory of the appellee in Milford, Illinois, in condition suitable for canning first grade corn. The appellee agreed to furnish the necessary seed free of charge, and to pay the appellants, after delivery was made, certain prices sp-

C. E. Russell, L. E. Russell, E. E. Russell, [illegible] E. Russell, [illegible] Malcolm Cobb, doing business under the firm name of Russell Brothers & Cobb,	
Appellants,	
vs.	Appeal from the Circuit
The Illinois Seed Corn Company, a corporation,	Court of Iroquois County.
Appellee.	

Mr. President Justice.

The appellants, C. E. Russell, L. E. Russell, E. E. Russell, C. E. Russell, Jr., and Malcolm Cobb, doing business under the firm name of Russell Brothers & Cobb, began suit in the circuit court of Iroquois County against the appellee, The [illegible] to be due appellants from appellee for 43.78 acres of corn at $64.12 per acre. There was a trial by jury, a verdict for $2724.76, being for 23 acres of corn at $64.12 per acre, and from the judgment rendered upon that verdict this appeal was prosecuted.

On March 12, 1921, the appellants and the appellee entered into a written contract wherein appellants agreed to plant for the appellee 400 acres of sweet corn during the season following the date of the contract. This corn was to be planted on the sweet [illegible] and weather conditions would permit. Should conditions make it impossible to plant on the days specified, another date was to be agreed upon. The appellants were to bear all expense of preparing the soil, planting, cultivating, harvesting, and delivering the corn to the factory of the appellee in Milford, Illinois, in condition suitable for canning first grade corn. The appellee agreed to furnish the necessary seed free of charge, and to pay the appellants, after delivery was made, certain prices specified

in the contract. The appellee was not to assume the responsibility for harvesting the crop, but was to help the appellants make delivery when necessary for which help there was to be a charge of $1.60 per ton.

The evidence shows that all of the corn planted by the appellants under this contract was planted in four fields, known as the Silliman field, the Stidham field, the Rhode field and the Wilson field. The first two of these fields belonged to the Russells and the last two belonged to Cobb. It is the contention of the appellants that the corn from all of these fields was delivered and paid for except 43.78 acres left by the appellee in the Silliman field, which is the corn in controversy in this suit. All of the corn was delivered by the appellee, except that the Russells delivered about 50 acres of the Stidham field, which was delivered subsequently to the delivery of the corn from the Silliman field. When settlement was made, checks were given to the Russells for their corn and to Cobb for his corn. There were about 101 acres delivered by appellee from the Silliman field which averaged $34.12 per acre, and the appellants contend that in the balance of this field, amounting to 43.73 acres, the corn not delivered averaged the same as that delivered, and for that reason the appellants are entitled to recover for 43.78 at $34.12 per acre, making the total amount sued for. The appellee claims that it was not liable for the corn left in the Silliman field because it was not delivered to appellee by appellants as provided in the contract; and that appellee paid for all corn contracted for except 23 acres. Appellants contend that the provision of the contract relative to the delivery of the corn by the appellants was waived by the appellee, who determined when the corn was fit to deliver and undertook to deliver the same.

Under the written contract appellants were to furnish the appellee 465 acres of corn. This was the extent of the appellee's liability under the contract. It is therefore very material how much corn was actually planted and how much corn

in the contract. The appellee was not to assume the responsibility for harvesting the crop, but was to help the appellants make delivery when necessary for which help there was to be a charge of $1.50 per ton.

The evidence shows that all of the corn planted by the appellants under this contract was planted in four fields, known as the Gillihan field, the Gibbins field, the Moore field and the Wilson field. The first two of these fields belonged to the Russelle and the last two belonged to Cobb. It is the contention of the appellants that the corn from all of these fields was delivered and paid for except 45.78 acres left by the appellee in the Gillihan field, which is the corn in controversy in this suit. [illegible] Russelle delivered about 50 acres in the Gillihan field, which was delivered subsequently to the delivery of the corn from the Gillihan field. When settlement was made, checks were given to the Russelle for their corn and to Cobb for his corn. There were about 101 acres delivered by appellee from the Gillihan field which averaged $34.12 per acre, and the appellants contend that in the balance of this field, amounting to 45.78 acres, the corn not delivered averaged the same as that delivered, and for that reason the appellants are entitled to recover for 45.78 at $34.12 per acre, making the total amount sued for. The appellee claims that it was not liable for the corn left in the Gillihan field because it was not delivered to appellee by appellants as provided in the contract; and that appellee paid for all corn contracted for except 23 acres. Appellants contend that the provision of the contract relative to the delivery of the corn by the appellants was waived by the appellee, who determined when the corn was fit to deliver and undertook to deliver the same.

Under the written contract appellants were to furnish the appellee 465 acres of corn. This was the extent of the appellee's liability under the contract. It is therefore very material how much corn was actually planted and how much corn

was actually deliverd. As to the amount of corn planted, the evidence is in some confusion. Baxley Russell, a witness for appellants, testified to the acreage of each tract, that the total acreage was 460 acres, and that 5 acres were added to this, making the 465 acres provided in the contract. On the other hand, C. E. Russell, one of the appellants, testified that the Billiman field contained 145.45 acres, the Stidham field contained 187.75 acres, the Rhode field contained 84.65 acres and the Wilson field contained 32.92 acres, making a total of 450.77 acres which were planted. On the other hand, S. G. David, the manager of the appellee, testified that the appellants did not deliver 465 acres of corn, but did deliver 442.6 acres, for which they were paid $13,107.04; and that all of the corn delivered was paid for. David testified in the presence of the appellants and was not disputed. With this conflict in the evidence, the court gave to the jury on behalf of the appellee, the sixth instruction, as follows: "The court instructs you that if you shall find from the preponderance of the evidence that defendant is liable to the plaintiffs in any sum on account of corn grown for defendant, and you should further find from the evidence that defendant has paid plaintiffs for 442 acres of such corn, then the court instructs you that the defendant would not in any event be liable for more than the proven value of said 23 acres of corn." The appellants contend that this instruction is erroneous for the reason that it does not limit its application to the corn grown for appellee under the contract, nor did it limit its application to the corn paid for by the appellee which was grown under the contract. In this condition of the evidence we think it was purely a question of fact for the jury as to how many acres of corn were planted, how many acres of corn were delivered, and what was the balance, if any, planted by the appellants and not paid for by the appellee. As the record stands, it is undisputed that 442 acres of corn have been delivered and paid for. If 465 acres were planted as testified to by Baxley Russell, and 442 acres were delivered, then the appellee is only liable for a

balance of 23 acres undelivered. On the other hand, if only 450.77 acres were planted as testified by C. A. Russell, and 442 acres were delivered, then the appellee is only liable for 8.77 acres undelivered. We do not think the sixth instruction is capable of the interpretation placed upon it by the appellants. There was only one contract in evidence and all deliveries were made under that contract, so it was not possible that the jury might be misled into the belief that there were other contracts or other corn which might be included under that instruction. The question of the amount due, if any, from the appellee was entirely a question of fact for the jury, and under the evidence we think the jury was justified in finding that the appellee was only liable for 23 acres of corn at $34.12 per acre, making a total of $784.46 the amount of the judgment.

It is insisted by the appellants that they were relieved from all responsibility for the delivery of the corn by the action of the appellee. This does not become material in this case provided there were only 23 acres of corn not delivered and the appellee was required by the judgment to pay for that balance, but we do not think the evidence sustains the contention of the appellants. Under the contract, the appellants were to deliver this corn. The appellee was to offer all assistance possible. The corn had to be gathered at a certain specific time in order to make first class canning corn. The condition of the corn was determined by the appellee, and the appellee sent teams into the fields to gather the corn, and was assisted, to a certain extent, by the appellants, who delivered a part of the acreage. By determining the time when the corn should be harvested and in sending their teams after it, the appellee did not waive the provisions of the contract, which required the appellants to deliver the corn. It is claimed that the agent of the appellants did not take the remainder of the corn for the reason that it was too hard to can. It is also claimed that appellee tried to sell the remainder of the corn to a canning factory at Hoopeston, Illinois, and that this tends to show that they recognized their liability for the balance of the corn.

balance of 20 acres undelivered. On the other hand, if only 480.77 acres were planted as testified by G. . Russell, and 482 acres were delivered, then the appellee is only liable for 3.77 acres undelivered. We do not think the sixth instruction is capable of the interpretation placed upon it by the appellants. There was only one contract in evidence and all testimony [illegible] , as it was not variable with the jury. [illegible] there was other evidence [illegible] under that instruction. The question of the amount due, if any, from the appellee was entirely [illegible] in this case, and we think the evidence we think the jury was justified in finding that the appellee was only liable for 20 acres of corn at 80c.[illegible] per acre, making a total of $[illegible].00 the amount of the judgment.

It is insisted by the appellants that they were relieved from all responsibility for the delivery of the corn by the notice of the appellee. This does not become material in this case because there was only 22 acres of corn not delivered and the appellee was required by the judgment to pay for that balance, but we do not think the evidence sustains the contention of the appellants. Under the contract, the [illegible] were [illegible] this corn.

The appellee was to offer all assistance possible. The corn had to be gathered at a certain specific time in order to make first class cooking corn. The condition of the corn was determined by the appellee, and the appellee sent teams into the fields to gather the corn, and was assisted, to a certain extent, by the appellants, who delivered a part of the acreage. By determining the time when the corn should be harvested and in sending their teams after it, the appellee did not waive the provisions of the contract, which required the appellants to deliver the corn. It is claimed that the agent of the appellants did not take the remainder of the corn for the reason that it was too hard to cam. It is also claimed that appellee tried to sell the remainder of the corn to a cooking factory at Hoopeston, Illinois, and that this tends to show that they recognized their liability for the balance of the corn.

It is also contended that the agent of the appellee agreed to pay for whatever corn was left. All of this evidence is in conflict and we do not think it is conclusive in the case.

Considering the case as a whole, the judgment rendered for 23 acres, under the evidence, was very favorable to appellants. There might be some question whether the evidence shows that 23 acres remained undelivered, but as that question is not raised by the appellee it will not be considered.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

It is also contended that the agent of the appellee agreed to pay for whatever corn was left. All of this evidence is in conflict and we do not think it is conclusive in the case.

Considering the case as a whole, the judgment rendered for 25 acres, under the evidence, was very favorable to appellants. There might be some question whether the evidence allows that 25 acres remained unfulfilled, but as that question is not raised by the appellee it will not be considered.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7001

(27186)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS A. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7001 Agenda 9.

Fred E. Stedman,
Defendant in error,

vs

Error to La Salle

Lou Hinton,
Plaintiff in error.

Opinion by Jett, J.

This is an action in assumpsit, instituted by defendant in error, against the plaintiff in error. The declaration contained only the consolidated common counts to which a bill of particulars was filed. The only plea filed was the general issue. A trial was had before the court without a jury, a jury having been waived by agreement of the parties and a judgment was rendered in favor of defendant in error for $500. In August 1917, defendant in error went from La Salle County in company with others, to the State of Minnesota for the purpose, among other things, of looking at some lands, as he contemplated a possible purchase. He met up with the firm of Stockman, Hecht and Hinton, real-estate agents. Said agents showed him lands which they had listed in their agency but did not succeed in selling any of them to him. In passing by a farm owned by one Stauffer, the attention of defendant in error was attracted to it and he was taken by said agents to one W. A. Streater, cashier of the First National Bank of Winnebago, Minnesota, who had the land for sale as the agent of Stauffer. After some negotiations, an agreement for the sale of this land by Streater to defendant in error was entered into whereby the latter was to pay as purchase price the sum of $24800.00.

Defendant in error gave his note for $1000. which he soon thereafter paid. Under the agreement Defendant in error was to pay $4000. in cash March 1, 1918 and the remainder of the purchase price was to be paid by the assumption of certain liens and by giving a note and mortgage. Prior to March 1. 1918, when the $4000. payment was to be made, the defendant in error notified the said

real estate firm that he would be unable to make such payment and asked that they assist him either by making the payment themselves and taking title to the land in trust for him or by finding someone who would take the contract off of his hands. Considerable correspondence passed between the said real estate agents and defendant in error thereafter, and Hinton came to Peru, Illinois, where defendant in error resides and talked the matter over with Stedman, defendant in error. What was said in this conversation is a matter of controversy. Defendant in error testified that Hinton assured him that he could get Stauffer to pay him back $500.00 and further that Hinton said if defendant in error would surrender his contract to him and if plaintiff in error could find some one who would pay the same amount defendant in error had agreed to pay, then he Hinton, would return $1000.00 to defendant in error to cover the amount of cash the latter was then out by reason of the transaction. Hinton's version of the conversation is that he simply told defendant in error he would try to do what he could for him but made no definate promises. Hinton then returned to Minnesota where, he, with the other members of his firm negotiated a sale of the land in question to one Allison, a nephew of one of the members of the said real estate firm. A deed was delivered to Allison which had been executed by Stauffer and bore date of March 1, 1918, and was evidently intended to be the deed in which defendant in error's name was to be thereafter written and delivered to him on March 1, 1918, in case he made the payment due on that day. It appears from the evidence that Stauffer knew nothing about the conversation between Hinton and Stedman, at Peru, and in closing the deal with Allison he, Staufer, credited upon the purchase price of Allison, the $1000.00, which he had received from defendant in error, Stedman. Stauffer also received all of the consideration and monies which he would have been entitled to receive if the original contract with defendant in error Stedman, had been carried out.

Subsequent to the taking over of the contract by Allison, plaintiff in error Hinton, sent to defendant in error Stedman, $500.00, with a

real estate firm that he would be unable to make such payment and asked that they assist him either by making the payment themselves and taking title to the land in trust for M. or by finding someone who would take the contract off of his hands. Considerable correspondence passed between the said real estate agents and defendant in error Stetsler, and Hinton came to town, Lillibon, where defendant in error resides and talked the matter over with Stebbem, defendant in error. What was said in this conversation is a matter of controversy. Defendant in error testified that Hinton assured him that he could get Stauffer to pay him back $800.00 and further that Hinton said if defendant in error would surrender his contract to him and if plaintiff in error could find some one who would pay the same amount defendant in error had agreed to pay, then he Hinton, would return $1000.00 to defendant in error to cover the amount or cash the latter was then out by reason of the transaction. Hinton's version of the conversation is that he simply told defendant in error he would try to do what he could for him but made no definite promises. Hinton then returned to Minneapolis where, he, with the other members of his firm negotiated a sale of the land in question to one Allison, a nephew of one of the members of the said real estate firm. A deed was delivered to Allison which had been executed by Stauffer and bore date of March 1, 1916, and was evidently intended to be the deed in which defendant in error's name was to be Stauffer written and delivered to him on March 1, 1916, in case he made the payment due on that day. It appears from the evidence that Stauffer knew nothing about the negotiation between Hinton and Stebbem, at Jerm, and in closing the deal with Allison he, Stauffer, credited upon the purchase price of Allison, the $1000.00, which he had received from defendant in error, Stebbem. Stauffer also received all of the consideration and money which he would have been entitled to receive if the original contract with defendant in error Stebbem, had been carried out.

Subsequent to the taking over of the contract by Allison, plaintiff in error Hinton, sent to defendant in error Stebbem, $800.00, with a

letter telling him that "he was sorry that it could not be $1500100 which he should have had on a deal."

The evidence shows that plaintiff in error had led the defendant in error to believe that he had surrendered up the Stedman contract and had induced Stauffer to return $500.00.

We are of the opinion that the evidence fairly tends to establish that Hinton promised Stedman to return to him $1000.00 in the event Stedman would surrender up his contract and a sale was made upon the terms which Stedman had agreed with Stauffer.

Defendant in error Stedman, did surrender his contract, and it was not concelled but was turned over to Allison, by the plaintiff in error, and the $1000. which Stedman had paid to Stauffer was taken into account in the transaction with Allison.

Plaintiff in error, assigns two reasons on which he relies for a reversal of this cause and insists most earnestly that his contentions are supported by authority.

These reasons are, first, that plaintiff in error was a member of the firm of Stockmann, Hecht and Hinton, and for that reason the court erred in admitting testimony over his objection and in passing on the propositions of law submitted. Second, that under the record in this case no recovery could be had for the reason the defendant in error had only declared on the common counts, and filed a bill of particulars limiting his right of recovery for money had and received.

Relative to the first above mentioned reason relied upon, it is necessary to briefly refer to the record.

The declaration consists of the consolidated common counts. A bill of particulars was filed. The plaintiff in error then filed the general issue.

It will be observed from the pleadings of the defendant in error that no joint liability appears. Although defendant in error under a rule of the Court filed a bill of particulars, nothing is to be found in the bill of particulars that suggests a joint liability. Under this state of the record what is the rule?

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Defendant in error Stedman, did surrender his contract, and it was not cancelled but was turned over to Hinton, by the plaintiff in error, and the $1000. which Stedman had paid to Stauffer was taken into account in the transaction with Hinton.

Plaintiff in error, assigns two reasons on which he relies for a reversal of this cause and insists most earnestly that his contentions are supported by authority.

These reasons are, first, that plaintiff in error was a member of the firm of Stedman, Hoch and Hinton, and for that reason the court erred in admitting testimony over his objection and in passing on the propositions of law submitted. -second, that under the record in this case no recovery could be had for the reason the defendant in error had only declared on the common counts, and filed a bill of particulars limiting his right of recovery for money had and received.

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It will be observed from the pleadings of the defendant in error that no joint liability appears. Although defendant [illegible] rule of the Court filed a bill of particulars, nothing is to be found in the bill of particulars that suggests a joint liability. Under this state of the record what is the rule?

In Wilson vs Wilson, 125 App. 385 which was a case in which the pleading consisted of the common counts, a bill of particulars and the general issue, the same as in this case and the defendant there sought to introduce evidence to show a joint liability with a copartner, who was not made a party defendant, and the Court held such evidence not admissible and on page 389 said; "The rule at common law is that if a person be omitted as defendant who ought to be joined in an action on a contract, advantage of the omission can only be taken by a plea in abatment, unless the joint liability appears from the plaintiff's own pleading."

The rule is well established that if a person be omitted as a defendant who ought to have been joined in an action on a contract advantage of the omission can only be taken by a plea in abatment unless the joint liability appears from the plaintiff's own pleading. David Rutter & Co. vs McLaughlin 257 Ill. 199.

The rule further is that if a defendant in a case as is presented by the record in the case under consideration fails to plead in abatment but pleads the general issue he admits there is no foundation for a plea in abatment. Rutter & Co., vs McLaughlin supra.

In the relation to the position of the plaintiff in error, in which he insists no recovery can be had in this case, under the common count for money had and received, we are unable to agree with him, as we do not understand the rule to be as plaintiff in error contends The count for money had and received may be supported by evidence that the defendant obtained the plaintiff's money by fraud, or false color or pretense. Drennan vs Bunn 124 Ill. 175.

An action of assumpsit will lie for money had and received for the use of the plaintiff wherever, by means of a contract relation, the defendant has obtained possession of money which in justice he ought to refund. Arnold vs Dodson 272 Ill. 377.

An action for money had and received may be maintained by any legal evidence showing that the defendant has received possession or obtained possession on money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff.

Law vs Uhrlaub 104 App. 265

In Wilson vs Wilson, 145 Ala. 385 which was a case in which the pleading consisted of the common count, and the general issue, and the defendant there sought to introduce evidence to show a joint liability with a copartner, who was not made a party defendant, and the Court held such evidence not admissible and on page 389 said;

"The rule at common law is that if a person be omitted as defendant who ought to be joined in an action on a contract, advantage of the omission can only be taken by a plea in abatement, unless the joint liability appears from the plaintiff's own statement.

The rule is well established that if a person be omitted as defendant who ought to have been joined in an action on a contract advantage of the omission can only be taken by a plea in abatement unless the joint liability appears from the plaintiff's own statement.

David Lanier & Co. vs McLaughlin 83 Ill. 109.

The rule further is that if a defendant in a case as aforesaid by the record in the case makes contribution while to plead in abatement but pleads the general issue he admits there is no foundation for a plea in abatement. Lanier & Co., vs McLaughlin supra.

In the relation to the position of the plaintiff in error, in which he insists no recovery can be had in this case, under the count for money had and received, we are unable to agree with him, as we do not understand the rule to be as plaintiff in error contends. The count for money had and received may be supported by evidence that the defendant obtained the plaintiff's money by fraud, or false color or pretence. Brennan vs Tuck 124 Ill. 178.

In action of assumpsit will lie for money had and received for the use of the plaintiff wherever, by means or a contract relation, the defendant has obtained possession of money which in justice he ought to refund. Arnold vs Dawson 27 Ill. 274.

An action for money had and received may be maintained by any legal evidence showing that the defendant has received possession or obtained possession on money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff.

Law vs Unknown 104 App. 260

Where money is recieved by an agent for a specific purpose, and and used for other and unauthorized purposes, a count for money had and received will sustain a judgment. Gray vs Callender 191 Ill. 173.

The evidence shows that the plaintiff in error became the agent for the defendant in error on the 1st of March 1918, and thereafter undertook to discharge the duties as such agent, in accordance with the instructions given him from time to time by defendant in error.

Defendant in error had a substantial interest in his contract which had not been forfeited; his interest was a property ~~right~~ right, and was evidence of a credit to the extent of $1000. which Stauffer was absolutely bound to recognize, either from Steadman or any of his assigns to whom he might sell prior to a legal cancellation of the contract, and forfeiture of the credit. Defendant in error, Steadman, having ~~in~~trusted his interests to the plaintiff in error Hinton, as his agent it was Hinton's duty in good faith to carry out his instructions if he accepted and acted under the agency or trust at all, and an implied contract to do so arises in law.

Fidelity Trust Co. vs Poole 136 App. 266

In view of the conclusion we have reached in this case, it is unnecessary to further extend this opinion. We have examined the authorities relied upon by plaintiff in error for a reversal, and as the law must necessarily arise out of the facts in a given case, we hold that the cases cited by plaintiff in error, when applied to the facts in this cause are not applicable.

We conclude, therefore, that in so far as this $1000. in controversy was concerned it was money had and received by plaintiff in error, and that he should have accounted for the same to defendant in error Steadman, and that the same can be recovered under the declaration and bill of particulars in~~t~~ this case. We hold that the pro~~position~~ positions of law tendered by plaintiff in error, were properly refused by the trial Court, because they attempted to present the defense that plaintiff in error should have been sued jointly with his partners.

The defense that the plaintiff in error should have been sued jointly with his partners must be presented by plea in abatement or

Where money is received by an agent for a specific purpose, and used for other and unauthorized objects, I cannot let money was and received will maintain a judgment. Tracy vs Gallenkamp 101 Ill. 176.

[illegible] undertook to discharge the duties so much again, in accordance with the instructions given him from time to time by defendant in error.

Defendant in error had a substantial interest in his contract which had not been forfeited; his interest was a property right, and was evidence of a credit to the amount of $1000. which otherwise was absolutely bound to recognize, either from the/[illegible] or any of his [illegible] to whom he might seek and/or to a legal consideration of the contract, and forfeiture of the credit. Difference in error, however, having interested his interests to the plaintiff in error direction, and his agent it was Simpson's duty in good faith to carry out his instructions if he accepted and acted under the agency or trust at all, and [illegible]

Bigelow trust vs. [illegible] 186 Ill. 560

[illegible] necessary to further embrace this opinion. [illegible] have examined the authorities relied upon by plaintiff in error for a reversal, and in the law must necessarily arise out of the facts in a given case, we hold that the cases cited by plaintiff in error, when applied to the facts in this case are not applicable.

We conclude, therefore, that in so far as this $1000. in controversy was concerned it was money had and received by plaintiff in error, and that he should have accounted for the same to defendant in error Sheldon, and that the same can be recovered under the declaration and bill of particulars in this case. We hold that the conditions conditions of law presented by plaintiff in error, were correctly refused by the trial Court, because they attempted to present the defense that plaintiff in error should have been sued jointly with his partners.

The defense that the plaintiff in error should have been sued jointly with his partners must be presented by plea in abatement or

by a plea in bar. We think the judgment of the Circuit Court works out substantial justice betweent the parties, and that the record in free from reversible error.

The judgment of the Circuit Court will therefore be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of April in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7015

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. A. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7015

Adelor J. Petit, appellee,

vs

Edith B. Dodson & Joseph H. Dodson,
appellants

Appeal from Kankakee.

Jett, J.

This is an action in assumpsit brought by appellee against appellants in the Circuit Court of Kankakee County, to recover on a note of $2500.00, executed by appellants and secured by a mortgage on real estate in the city of Chicago, Illinois. Judgment was entered in favor of appellee and against appellants for the amount with interest thereon due upon said note.

It appears from the evidence that appellants were the owners of certain real estate in the city of Chicago. They executed a first mortgage on this real estate to one Frederick N. Sawyer to secure a note which they had executed, and delivered to the said Sawyer. Afterward appellants executed a note for $2500 to the Chicago Title and Trust Company, and to secure the same executed and delivered to said Trust Company a second mortgage on the same property to secure said note, which note for $2500, and the mortgage to secure the same were subsequently assigned to appellee. A bill was filed in the Superior Court of Cook County to foreclose the first mortgage made to Sawyer. Appellee was made a party defendant to that bill and filed an answer thereto but did not file a cross bill. A decree of foreclosure was rendered which stated the amount which was due upon the note and mortgage to appellee, but afforded him no relief. There was a sale by the master in chancery under the decree rendered in the foreclosure proceedings, and a certificate of purchase issued, which certificate was subsequently assigned to appellee. It further appears from the evidence that a few days before the equity of redemption expired on this certificate, appellants, the owners of this equity of redemption, made application to appellee for an extension.

Gen. No. 7015

Adelor J. Pratt, appellee,

vs.

[illegible]

[illegible], v.

This is an action in assumpsit brought by appellee against appellants in the Circuit Court of Kankakee County, to recover on a note of $2500.00, executed by appellants and secured by a mortgage on real estate in the city of Chicago, Illinois. Judgment was entered in favor of appellee and against appellants for the amount with interest thereon due upon said note.

It appears from the evidence that appellants were the owners of certain real estate in the city of Chicago. They executed a first mortgage on this real estate to one Lockerbie. Lawyer to secure a note which they had executed, and delivered to the said Lawyer. Afterward appellants executed a note for $2500 to the Chicago Title and Trust Company, and to secure the same executed and delivered to said Trust Company a second mortgage on the same property to secure said note, which note for $2500, and the mortgage to secure the same were subsequently assigned to appellee. A bill was filed in the Superior Court of Cook County to foreclose the first mortgage made to Lawyer. Appellee was made a party defendant to that bill and filed an answer thereto but did not file a cross bill. A decree of foreclosure was rendered which barred the amount which was due upon the note and mortgage to appellee, but afforded him no relief. There was a sale by the master in chancery under the decree rendered in the foreclosure proceedings, and a certificate of purchase issued, which certificate was subsequently assigned to appellee. It further appears from the evidence that a few days before the equity of redemption expired on this certificate, appellants, the owners of this equity of redemption, made application to appellee for an extension.

of thirty days in which to redeem from the sale. Appellee was willing to grant an extension if appellants would execute and deliver to him a quit claim deed conveying the real estate and this appellants did, but they did not redeem the premises within the thirty days nor pay the second mortgage to the appellee. About three years later appellee filed his suit in the circuit court of Kankakee county, where appellants reside, to recover the amount due on the twenty five hundred dollar note which was secured by the second mortgage on the premises.

It is first urged as a ground of reversal that appellee agreed at the time the quit claim deed was executed and delivered to him that he would cancel the note of twenty five hundred dollars in question in this case and surrender it to appellants. Whether the appellee made such an agreement was purely a question of fact and the burden was upon the appellants to prove that the note was thus paid, and the evidence establishing such payment must be clear and convincing, and it must be made to appear that the parties intended such conveyance to be a payment of the debt. Burton, et al, v Perry, et al, 146 Ill. 71-114. The intention to pay the debt by deed to the property must not be inferred where the creditor retained the evidence of the indebtedness and the security pledged for its payment. Burton, et al, v Perry, et al, supra.

We do not think that the evidence shows any agreement to cancel the note and surrender the same toappellants. Appellee testified that there was no such agreement. He was corroborated in this by Harris F. Williams, friend and attorney for appellants in the transaction, who was a witness at the trial. In addition to this testimony it also appears from the evidence that appellee retained possession of the note in question about three years after the alleged agreement was made. It also appears from the evidence that after the suit was commenced in Kankakee County that appellants sent their representative, one O. K. Baldwi to appellee and requested him for an extension of time to pay the note which extension was granted by appellee. From all the foregoing testimony

of thirty days in which to redeem from the sale. Appellee was willing to grant an extension if appellants would execute and deliver to him a quit claim deed conveying the real estate and this appellants did, but they did not redeem the premises within the thirty days nor pay the second mortgage to the appellee. About three years later appellee filed his suit in the circuit court of Kankakee county, where appellants reside, to recover the amount due on the twenty five hundred dollar note which was secured by the second mortgage on the premises.

It is first urged as a ground of reversal that appellee agreed at the time the quit claim deed was executed and delivered to him that he would cancel the note of twenty five hundred dollars in question in this case and surrender it to appellants. Whether the appellee made such an agreement was purely a question of fact and the burden was upon the appellants to prove that the note was thus paid, and the evidence establishing such payment must be clear and convincing, and it must be made to appear that the parties intended such conveyance to be a payment of the debt. Burton, et al. v Perry, et al, 146 Ill. 1-14. The intention to pay the debt by deed to the property must not be inferred where the creditor retained the evidence of the indebtedness and the security pledged for its payment. Burton, et al. v Perry, et al, supra.

We do not think that the evidence shows any agreement to cancel the note and surrender the same to appellants. Appellee testified that there was no such agreement. He was corroborated in this by Harris K. Williams, friend and attorney for appellants in the transaction, who was a witness at the trial. In addition to this testimony it also appears from the evidence that appellee retained possession of the note in question about three years after the alleged agreement was made. It also appears from the evidence that after the suit was commenced in Kankakee County that appellants sent their representative, one O. K. Baldwin to appellee and requested him for an extension of time to pay the note which extension was granted by appellee. From all the foregoing testimony

we are of theopinion that there was no agreement to surrender and cancel the note.

It is next insisted by appellants that the note and second mortgage were merged in the decree of foreclosure under the first mortgage. Also that they were extinguished by reason of the execution of the quit claim deed by appellants to appellee. We do not agree with appellants in either of these contentions. In the foreclosure case while the appellee was a party defendant, he only filed an answer but did not file a cross bill, and while the decree found the amount due on his note it did not afford him any affirmative relief but merely provided for the sale of the premises under the first mortgage. When the certificate of sale under the decree foreclosing the first mortgage was assigned to appellee by the mortgagee in the first mortgage he merely assumed the rights which that mortgagee had under his certificate of purchase, that is the right to have a deed issued to him for the premises provided they were not redeemed as provided by law. If they had been redeemed as provided by law the second mortgage would have remained in full force and effect, and have been a first lien on the property. When the quit claim deed was executed it was as a further security for the claim of appellee and for the purpose of granting an extension of time to appellants to redeem from the first foreclosure sale. It had the effect of merging the mortgage in the quit claim deed but did not have the effect of merging the note and indebtedness.

Holding as we do that the finding of the trial court is correct, and finding no reversible error upon the trial, the judgment is hereby affirmed.

Affirmed.

we are of the opinion that there was no agreement to surrender and cancel the note.

It is now insisted by appellants that the note and second mortgage were merged in the decree of foreclosure under the first mortgage. Also that they were extinguished by reason of the execution of the quit claim deed by appellants to appellee. We do not agree with appellants in either of these contentions. In the foreclosure case while the appellee was a party defendant, he only filed an answer but did not file a cross bill, and while the decree found the amount due on his note it did not enforce his lien, affirmatively relief has merely provided for the sale of the premises under the first mortgage. When the certificate of sale under the decree foreclosing the first mortgage was assigned to appellee by the mortgagee in the first mortgage he merely succeed the rights which that mortgagee had under his certificate of purchase, that is the right to have a deed issued to him for the premises provided they were not redeemed as provided by law. If they had been redeemed as provided by law the second mortgage would have remained in full force and effect, and have been a first lien on the property. When the quit claim deed was executed it was as a matter security for the claim of appellee and for the purpose of granting an extension of time to appellants to redeem from the first foreclosure sale. It had the effect of merging the mortgage in the quit claim deed but did not have the effect of merging the note and indebtedness.

Holding as we do that the finding of the trial court is correct, and finding no reversible error upon the trial, the judgment is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7074

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS A. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7074

Roy D. Wistehuff and Oliver Wagner
doing business under the name and
style of Wistehuff and Wagner,
appellee,

vs

Appeal from Peoria

St. Louis, Springfield and Peoria
Railroad, a corporation,
appellant.

Jett, J.

The appellee brought suit in the Circuit Court of Peoria County, against the appellant to recover damages growing out of a collision between an electric car of the appellant, and a truck of the appellees. A verdict was returned for $769 by the jury and this appeal is prosecuted from the judgment rendered thereon. The case went to the jury on the first, third and fourth counts of the declaration, the second count having been dismissed out of the case by the appellees during the course of the trial. Each count alleged that the appellees were in the exercise of due care and caution for the safety of themselves and their truck; that appellants cars struck and collided with appellees motor truck causing the damage and that while said truck was being repaired they were deprived of the use of the same and thereby lost profits and gains which they otherwise would have acquired from their said business in the sum of to-wit; $250.00.

The first count of the declaration also alleges that the appellant was guilty of negligence in traveling at a rate of speed to-wit, 40 miles per hour in violation of an ordinance which it is alleged provides that it shall be unlawful for any railway train or car to travel within the limits of the village at a rate of speed in excess of 10 miles per hour. The third count alleges among other things that appellant carelessly and negligently operated the train of cars at a high and dangerous rate of speed to-wit, 40 miles an hour. The fourth count also alleges that appellants negligence consisted in the failure to sound a gong, whistle or bell. Appellant filed a pleas of general issue. The trial was had with result as aforesaid.

On January 13, 1920, at 12:30 noon one of the appellees was driving

Sec. 16. TOYA

Ley D. Wistehurt and Oliver Wagner
doing business under the name and
style of Wistehurt and Wagner,
appellee,

vs. Appeal from Peoria

[illegible], Trustee in and [illegible]
defined, a corporation,
appellant.

[illegible], J.

The appellee brought suit in the Circuit Court of Peoria County, against the appellant to recover damages growing out of a collision between an electric car of the appellant, and a truck of the appellees. A verdict was returned for $750 by the jury and this appeal is prosecuted from the judgment rendered thereon. The case went to the jury on the first, third and fourth counts of the declaration, the second count having been dismissed out of the case by the appellees during the course of the trial. Each count alleged that the appellees were in the exercise of due care and caution for the safety of themselves and their truck; that appellees [illegible] with appellant motor truck causing the damage and that while said truck was being repaired they were deprived of the use of the same and thereby lost profits and gains which they otherwise would have acquired from their said business in the sum of to-wit; $250.00.

The first count of the declaration also alleges that the appellant was guilty of negligence in travelling at a rate of speed to-wit, 40 miles per hour in violation of an ordinance which it is alleged provides that it shall be unlawful for any railway train or car to travel within the limits of the village at a rate of speed in excess of 10 miles per hour. The third count alleges among other things that appellant carelessly and negligently operated the train of cars at a high and dangerous rate of speed to-wit, 40 miles an hour. The fourth count also alleges that appellants negligence consisted in the failure to sound a gong, whistle or bell. Appellant filed a plea of general issue. The trial was had with result as aforesaid.

On January 16, 1920, at 12:30 noon one of the appellees was driving

a Republic Truck south on Tremont Street in the village of Morton, in said Peoria County. The tracks of the appellant extend east and west on Bloomington Street and across Tremont Street. Tremont Street runs north and south. The collision occurred at the intersection of Bloomington and Tremont Streets. Bloomington Street appears to be the main street in the village. Each of the streets were about fifty feet in width and were public highways and there were buildings on each side of each street. At the time of the collision the train of cars of appellant had not yet reached the station. The day in question was damp and cold. There is a serious conflict in the testimony of the witnesses as to the manner of operation of appellants train. All witnesses testified that appellees truck was traveling slowly. A reversal of the case is sought by appellant and appellant assigns first, that appellees were guilty of contributory negligence: the second reason assigned is that appellant was not guilty of negligence; and the third reason assigned for reversal is that the verdict is excessive in amount; and fourth, that appellees instruction on damages is erroneous in that it includes the reasonable value of the use of the truck while appellees were necessarily deprived of it while being repaired. The charge of negligence of appellees is based upon the fact that when the driver of the truck came up to the crossing and could look west down the tracks after he passed the building, he, the said driver, claiming that he did look west and that he did not see any car coming, whereas as a matter of fact a car was coming and in a very few moments struck his truck. It is conceeded by appellant that there is a serious conflict in the evidence of the witnesses on either side as too the manner of operation of appellant's train. And it is likewise conceded by appellant that all witnesses testified that appellees truck was travelling slowly. The driver of the truck testified among other things that when approaching the crossing in question he passed a line of buildings; that there was a drug store on the corner; after he passed the line of buildings approaching the crossing he glanced down the track; that he did not see a car in either block. He also said I then went on to a point within three feet of the track.

a municipal Truck route on Fremont Street in the village of Hudson, in said Lenawee County. The tracks of the appellant extend east and west [illegible]. Fremont Street runs north and south. The collision occurred at the intersection of [illegible] and Fremont Streets. [illegible] Street appears to be the main street in the village. Each of the streets were about fifty feet in width and were [illegible] and there were buildings on each side of said street. At the time of the collision the train of cars of appellant had not yet reached the station. The day in question was damp and cold. There is a serious conflict in the testimony of the witnesses as to the manner of operation of appellant's train. All witnesses testified [illegible]. A reversal of the case is sought [illegible] and appellant contends first, that appellee was guilty of contributory negligence; the second reason assigned is that appellant was not guilty of negligence; and the third reason assigned for reversal is that the verdict is excessive in amount; and fourth, [illegible] as that it [illegible] the reasonable value of the use of the truck while appellee was necessarily deprived of it while being repaired. The [illegible] driver of the truck [illegible] track after he passed the building, he, the said driver, claiming that he did look west and that he did not see any car coming, whereas as a matter of fact a car was coming and in a very few moments struck his truck. It is conceded by appellant that there is a serious conflict in the evidence of the witnesses on either side as to the manner of operation of appellant's train. And it is likewise conceded by appellant that all witnesses testified that [illegible] slowly. The driver of the truck testified among other things that when approaching the crossing [illegible] there was a long train on the [illegible] buildings approaching the crossing he glanced down the track, that he did not see a car in either direction. He also said I then went on to a point within three feet of the track.

That he did not see the c r at any time, from the time that he glanced up and down the track until he got within three feet of the track.

Samuel Seidel apparently a disinterested witness testified: "I was facing the track. I was observing the train. The speed of the train as it approached the crossing was about 25 or 30 miles an hour. The truck was coming south on Tremont street. It was moving about 5 miles an hour. As the truck approached the crossing the driver looked up and down. He then went forward. As the train hit him it threw the truck about 15 feet to the east. The train was going east." Said witness also testified that he did not hear any bell or whistle sounded on the train as it approached the crossing from the time he saw it until the time it hit the truck. That he observed the train from the time he first saw it, until it stopped. Other witnesses on the part of appellees testified they heard no signal sounded. A number of witnesses on the part of appellant testified that the train when approaching the crossing was travelling at a speed from six , seven and eight miles an hour. Six witnesses testified on the part of appellant that they heard the whistle sounded, three or four times when approaching the crossing. In view of these facts it became and was a question for the jury to determine whether or not appellees were guilty of contributory negligence and whether or not they were in the exercise of due care and caution immediately before and at the time of the collision. Likewise it was a question of fact for the jury to pass upon as to whether or not the appellant was guilty of the negligence charged against it in the declaration or some count thereof. The driver of the truck in giving his testimony in the first instance stated," "I was up next to the drug store when I was on the west side of Tremont street going south. When I got up there and looked out and could see by this building I saw the car coming." While the witness was on the stand he testified as previously heretofore detailed, in a former part of this opinion. The case standing alone upon the testimony of appellees under the rule necessarily required the court to submit the case to the jury.

That he did not see the car at any time, from the time that he glanced up and down the track until he got within three feet of the track.

Samuel Smith apparently a disinterested witness testified: "I was facing the track. I was observing the train. The speed of the train as it approached the crossing was about 25 or 30 miles an hour. The truck was coming south on Fremont street. It was moving about 5 miles an hour. As the train approached the crossing the driver looked up and down. He then went forward. As the train hit him it threw the truck about 15 feet to the east. The train was going east." A disinterested witness also testified that he did not hear any bell or whistle sounded as the train as it approached the crossing from the time he saw it until the time it hit the truck. That he observed the train from the time he first saw it, until it stopped. Other witnesses on the part of appellees testified they heard no signal sounded. A number of witnesses on the part of appellant testified that the train when approaching the crossing was traveling at a speed from ten, seven and eight miles an hour. Six witnesses testified on the part of appellant that they heard the whistle sounded, three or four times when approaching the crossing. In view of these facts it became and was a question for the jury to determine whether or not appellees were guilty of contributory negligence and whether or not they were in the exercise of due care and caution immediately before and at the time of the collision. Likewise it was a question of fact for the jury to pass upon as to whether or not the appellant was guilty of the negligence charged against it in the declaration of some count thereof. The driver of the truck in giving his testimony in the first instance stated, "I was up next to the drug store when I was on the west side of Fremont street going south. When I got up there and looked out and could see I

[illegible] I saw the [illegible]." [illegible]

[illegible] stand he testified as previously heretofore detailed, in a former part of this opinion. The case standing alone upon the testimony of appellees [illegible]

[illegible]

After all the evidence was in we are not prepared to say that the appellees have established their right by the greater weight of the evidence to recovery. We are not unmindful of the rule of the right of the jury to pass upon questions of fact and that the courts do, as they should, most generally sustain the findings of a jury upon controverted questions of fact. In view of the testimony of the driver of the truck, and on account of the fact that when he approached this crossing there was nothing to obstruct his view from the direction the train was coming. We regard it as an exceedingly close question as to whether or not the appellees were in the exercise of due care and caution. Also we are not prepared to hold that the weight of the testimony establishes the fact that the appellant failed to give a signal when approaching the crossing, or that it was travelling at a rate of speed prohibited by the ordinance introduced by appellees. We hold that appellees declaration is sufficient in its averments, as a basis for a recovery of damages by being deprived of the use of the truck, but it is not quite clear from the evidence how the jury could have found a verdict in the sum that it did and based the finding upon the evidence in the record. On the whole we are not satisfied with the judgment in this case, and feel that it should be submitted to another jury. We therefore reverse the judgment of the Circuit Court and remand the same for a new trial.

Reversed and remanded for a new trial.

After all the evidence was in we are not prepared to say that the appellees have established their right by the greater weight of the evidence to recovery. We are not unmindful of the rule of the right of the jury to pass upon questions of fact and that the courts do, as they should, most generally sustain the findings of a jury upon controverted questions of fact. In view of the testimony of the driver of the truck, and on account of the fact that when he approached this crossing there was nothing to obstruct his view from the direction the train was coming. We regard it as an exceedingly close question as to whether or not the appellees were in the exercise of due care and caution. Also we are not prepared to hold that the weight of the testimony establishes the fact that the appellant failed to give a signal when approaching the crossing, or that it was travelling at a rate of speed prohibited by the ordinance introduced by appellees. We hold that appellees destruction is sufficient in the extremes, as a basis for a recovery of damages by being deprived of the use of the truck, but it is not quite clear from the evidence how the jury could have found a verdict in the sum that it did and based the finding upon the evidence in the record. On the whole we are not satisfied with the judgment in this case, and feel that it should be submitted to another jury. We therefore reverse the judgment of the Circuit Court and remand the case for a new trial.

Reversed and remanded for a new trial.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7077

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7077 Agenda 30.

Anton Kawa and Agnes Kawa,
appellants,
vs
Henry Sullivan, Appellee Appeal from County Court Mc Henry

Opinion by Jett, J.

Appellants begun a suit before a Justice of the Peace in the County of McHenry, against appellee, and on June 23, 1919 a judgment was rendered against the appellee and in favor of the appellants. On July 8, 1919 an appeal bond was presented to the Justice and approved and said appeal bond was sent to the clerk of the County Court on September 24, 1919. On the 15 day of October 1919 the Justice sent a transcript of the record to the County Clerk. The filing fee, which should have been paid to the Justice within 20 days of the date of the judgment, under the law which went into effect July 1, 1919 was not paid until October 15 1919. The cause was duly docketed in the County Court and on March 8, 1920 a stipulation was enterdd into between the parties to the suit, that the case should be set for trial on March 16, 1920, but the case was not tried at that time. On April 25, 1921 about thirteen months after the case had been set for trial, appellants made am motion in writing to dismiss the suit and the appeal on the ground that the filing fee had not been paid within the 20 days as provided by the statute. No further steps were had in the case until November 1921, at which time there was a hearing in the County Court on the motion to dismiss. It is not quite clear from the record as to just when this hearing was had but it was probably had on the 30 of November 1921, and at that date the Court over-ruled the motion of appellants to dismiss the appeal because the filing fee had not been paid as provided by the statute but there is no order appearing in the record overruling this motion. In the bill of exceptions it appears that a statement was made by the Court and it was so announced by the Court that he had passed upon the motion. The cause was set down for trial and on December 1, 1921 was called for trial. The appellants failed to appear and the suit was dismissed for the want of prosecution.

Anton Lewe and Agnes Klaus,
appellants,
vs
Henry Sullivan, Appellee Appeal from County Court Mc Henry

William H. Fitt, J.

Appellants began a suit before a Justice of the Peace in the County of McHenry, against appellee, and on June 28, 1919 a judgment was rendered against the appellee and in favor of the appellants. On July 8, 1919 an appeal bond was presented to the Justice and approved and said appeal bond was sent to the clerk of the County Court on September 24, 1919. On the 18 day of October 1919 the Justice sent a transcript of the record to the County Clerk. The filing fee, which should have been paid to the Justice within 20 days of the date of the judgment, under the law which went into effect July 1, 1919 was not paid until October 15 1919. The cause was duly docketed in the County Court and on March 8, 1920 a stipulation was entered into between the parties to the suit, that the case should be set for trial on March 16, 1920, but the case was not tried at that time. On April 28, 1921 about thirteen months after the case had been set for trial, appellants made an motion in writing to dismiss the suit and the appeal on the ground that, the filing fee had not been paid within the 20 days as provided by the statute. No further steps were had in the case until November 1921, at which time there was a hearing in the County Court on the motion to dismiss. It is not quite clear from the record as to just when this hearing was had but it was probably had on the 30 of November 1921, and at that date the Court over-ruled the motion of appellants to dismiss the appeal because the filing fee had not been paid as provided by the statute but there is no order appearing in the record overruling this motion. In the full of exceptions it appears that a statement was made by the Court and it was so announced by the Court that he had passed upon the motion. The cause was set down for trial and on December 1, 1921 was called for trial. The appellants failed to appear and the suit was dismissed for the want of prosecution.

It is from the order of the County Court dismissing the suit for the want of prosecution that this appeal is prosecuted. Under the provisions of the statute it was the duty of the appellee to pay the filing fee to the Justice within 20 days of the rendition of the judgment. It was not a compliance with the statute that the appellee merely asked the Justice what the filing fee was. It is shown by the evidence that appellee asked the Justice what the fee was and the Justice said he did not know but that it could be paid to the clerk of the County Court. This was not a compliance with the statute. The filing fee should have been paid to the Justice or tendered to him and the appeal was not perfected until this was done, and if the appellants had preserved their rights in the County Court by the proper motions, it would have been the duty of the County Court to have dismissed the appeal for the reason the fee was not paid within the time provided by statute. Conklin vs. Tolag. Opinion filed in this court. February 23 1922. In the present condition of the record however, we are of the opinion that the action of the County Court should be affirmed for the reason, that after the transcript had been filed in the County Court and the fee paid on October 15, 1920, the appellants voluntarily went into the County Court and agreed that the case should be set for trial on March 16, 1920 and the case was so set. The motion to dismiss the appeal because it was not properly perfected was not made until April 25, 1921 some 13 months after the case had been set for trial and almost one year after the transcript had been filed in the County Court. A motion to dismiss an appeal because it is not properly perfected is a dilatory motion and should be made at the earliest possible moment. The fact that the appellants agreed that the case should be set for trial amounted to a waiver of the irregularity of the manner of transferring the cause from the Justice to the County Court. This has been the rule in this state as announced by our Supreme Court since the case of Mitchell vs Jacobs 17 Ill. 235. In discussing the question involved in this cause the Court said on page 236 of Mitchell vs Jacobs Supra; "This was an appeal taken from

It is from the order of the County Court dismissing the suit for the want of prosecution that this appeal is prosecuted. Under the provisions of the statute it was the duty of the appellee to pay the filing fee to the Justice within 20 days of the rendition of the judgment. It was not a compliance with the statute that the appellee merely asked the Justice what the filing fee was. It is shown by the evidence that appellee asked the Justice what the fee was and the Justice said he did not know but that it could be paid to the clerk of the County Court. This was not a compliance with the statute. The filing fee should have been paid to the Justice or tendered to him and the appeal was not perfected until this was done, and if the appellants had preserved their rights in the County Court by the proper motions, it would have been the duty of the County Court to have dismissed the appeal for the reason the fee was not paid within the time provided by statute. Conklin vs. [illegible], Opinion filed in this court. [illegible] 25 1922. In the present condition of the record however, we are of the opinion that the action of the County Court should be affirmed for the reason, that after the transcript had been filed in the County Court and the fee paid on October 16, 1920, the appellants voluntarily went into the County Court and agreed that the case should be set for trial on March 16, 1920 and the case was so set. The motion to dismiss the appeal because it was not properly perfected was not made until April 26, 1921 some 13 months after the case had been set for trial and almost one year after the transcript had been filed in the County Court. A motion to dismiss an appeal because it is not properly perfected is a dilatory motion and should be made at the earliest possible moment. The fact that the appellants agreed that the case should be set for trial amounted to a waiver of the irregularity of the manner of transferring the case from the Justice to the County Court. This has been the rule in this state as announced by our Supreme Court since the case of Mitchell vs Jacobs 17 Ill. 236. In discussing the question involved in this cause the Court said on page 236 of Mitchell vs Jacobs Supra; "This was an appeal taken from

the County to the Circuit Court. At the first term after the appeal was taken, the parties appeared and the cause was continued by consent. At the nextterm , the appellee in the Circuit Court made a motion to dismiss the appeal, because the appeal bond was not filed within the time prescribed by the statute; and also, because it was not approved by the proper officer. This motion was overruled, which is assigned for error. This identical question was decided by this Court, in the case of Pearce vs Swan, I Scam. 266. In that case the Court said: "Taking the appeal, executing the bond, and delivering the papers to the Circuit Court, are the means provided by law for transferring the cause from the justice and constable to the Circuit Court. These measures are in the nature of process to remove the cause from the inferior to the superior court. When process by which a court obtains jurisdiction of a cause is irregular, and no objection is made, the irregularity is waived. The irregularity is not like the case of a defective jurisdiction over the subject matter; for the statute gives jurisdiction to the justice and constable in the first instance, and to the Circuit Court by appeal. ** * * Now, the rule is well settled that if a party appears to a cause for any purpose whatever, except to object to the process or service, he waives all objections thereto, although the process may be void, or there may have been no service. Easton v. Altum, I Scam. 250. Here the appellee did appear at the appearance term, in the Circuit Court, and consented to a continuance of the cause. When he did that, he submitted himself and his cause to the jurisdiction of the court; and it was too late afterwards for him to object, that himself or the cause was not properly brought there."

Appellants cite the case of The People vs Andrus 299 Ill. 50, as authority in support if their contention. When the Andrus case is considered in connection with the more recent case of Pocahontas Mining Company vs the Industrial Commission, 301 Ill. 462, it is readily seen that it cannot be relied upon as sustaining appellants position.

In the last above mentioned case on page 475 the court said: "Under the decisions of this court is may be broadly stated that

the County to the Circuit Court. At the first term after the appeal was taken, the parties appeared and the cause was continued by consent. At the next term, the appellee in the Circuit Court made a motion to dismiss the appeal, because the appeal bond was not filed within the time prescribed by the statute; and also because it was not approved by the clerk of the court. The clerk's refusal to approve the bond for error, this judicial position was plainly in his power, in the exercise of his official discretion. Indeed, in this case, the clerk said: "Taking the appeal, assuming the bond, and defending the suits in the lower court, are the same proceedings in law for transferring the cause from the justice and constable to the Circuit Court. These measures are in the nature of process to remove the cause from the inferior to the superior court. The process by which a court obtains jurisdiction of a cause is irregular, and no objection is made, the irregularity is waived. The irregularity is not like the case of a defective jurisdiction over the subject matter; for the statute gives jurisdiction to the justice and constable in the first instance, and to the Circuit Court by appeal. * * * Now, the rule is well settled that a party appears to a cause for any purpose whatever, except to object to the process or service, he submits to the jurisdiction, unless the process may be void, or there may have been no service. Beaton v. Altum, 1 Gilm. 290. Here the appellee did appear at the appearance term, in the Circuit Court, and concerted the continuance of the cause. When he did that, he submitted himself and his cause to the jurisdiction of the court; and it was too late afterwards for him to object, that himself or the cause was not properly brought there."

Especially did the case of the Illinois Central Railroad Co. 123. 90, an authority in support of their contention. That the Illinois court is concerned in connection with Illinois laws, of incorporated railroad company in the International Commerce, 101 U.S. 111, and it is readily seen that it cannot be called upon to determine conflicting constitutional questions.

In his last brief counsel seems to have drawn the court with: "Under the decisions of this court it may be broadly stated that

where a court of original jurisdiction has jurisdiction of the subject matter of a suit, and the parties enter their appearance before the court and contest their rights before the court to a final judgment without objection in any way to the right of the trial court to hear the cause and to render such final judgment, it does not matter in what manner the parties were brought before the court, and on appeal or review by writ of error to an appellate court or to this court the parties will be absolutely bound, so far as the question of jurisdiction of their persons and of the particular case asked to be reviewed is concerned. Accordingly this court has frequently held that in cases tried before the Circuit Court on appeal from a Justice of the Peace or from some county of probate court, and wherein the Circuit Court had jurisdiction of the subject matter, and the trials are de novo in the circuit court, all objections to process or service of process in such court, and all irregularities in taking an appeal, are waived, if the case is by appeal unless such irregularities in process or in bonds or in other proceedings on appeal are taken advantage of in the circuit court and before any appearance is made in the suit by the party questioning such irregularities.

We are, therefore, in view of the condition of the record in this case, firmly convinced that the law is with the contention of the appellee and that the judgment below should be affirmed, which is accordingly done.

Affirmed.

where a court of original jurisdiction has jurisdiction of the subject matter of a suit, and the parties [illegible] before the court and conduct their arguments before the court to a final judgment without objection in any way to the right of the trial court to hear the cause and to render such judgment, it does not matter in what manner the question was brought before the court, and no appeal or review by writ of error to an appellate court or to this court the merits will be considered, so far as the question of jurisdiction of that court over the of the particular case asked to be reviewed is concerned. Accordingly this court has frequently held that in cases tried before the circuit court on appeal from a justice of the peace or from some county or probate court, and wherein the circuit court has jurisdiction of the subject matter, and the trial has been in open court, all objections to process or service or pleadings in such court, and all irregularities in taking an appeal, are waived, if the case is by appeal within such irregularities in process or in such or in other proceedings on appeal are taken advantage of in the circuit court and before any assignment is made in the suit by the party questioning such irregularities.

We are, therefore, in view of the manifestation of the record in this case, firmly convinced that the law is with the contention of the appellee and that the judgment below should be affirmed, which is accordingly done.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and ~~twenty-~~ three

Justus L. Johnson
Clerk of the Appellate Court.

7091

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. no. 7091. Agenda 39

James J. Moran, appellee,

vs

Sam Bernstein and
Sarah Bernstein
appellants.

Appeal from Bureau

Opinion by Jett, J.

On the 22 day of September, 1920, James J. Moran, appellee, instituted a forcible entry and detainer proceeding before a justice of the peace in Spring Valley, in the County of Bureau, for the purpose of recovering possession of a store room situated on Lot 24 in Block 31, in the City of Spring Valley, in said County from the appellants and obtained a judgment against said appellants, who on the 9 day of October, 1920 perfected an appeal to the Circuit Court of said Bureau County,. The case was tried in the Circuit Court of said County before a jury, and the appellee obtained a judgment against said appellants for the possession of the store room in controversy, from which judgment in the Circuit Court, this appeal is prosecuted to this court.

On the 14 day of August, 1913, appellee entered into a written lease of the premises involved in this cause with the appellants who were husband and wife. The lease was executed in duplicate, the copy retained by appellee being signed by the appellants, and the copy retained by appellants was signed only by James J. Moran, appellee. At the time of entering into the lease, the building was owned by appellee Moran, Bernard R. McGraw and Moses F. Peltier, but before the termination of the lease McGraw and Peltier sold their interest in the property to the appellee. Appellants in their statement of the case, state that the lease by Moran, McGraw and Peltier to appellants was never signed

Gen. No. 7091.

James J. Moran, appellee,

vs.

Sam Bernstein and
Sarah Bernstein, appellants.

Appeal from Saline.

Opinion by Jett, J.

On the 28 day of September, 1920, James J. Moran, appellee, instituted a forcible entry and detainer proceeding before a justice of the peace in Spring Valley, in the County of Bureau, for the purpose of recovering possession of a store room situated on Lot 24 in Block 21, in the City of Spring Valley, in said County from the appellants and obtained a judgment against said appellants, who on the 9 day of October, 1920 perfected an appeal to the Circuit Court of said Bureau County. The case was tried in the Circuit Court of said County before a jury, and the appellee obtained a judgment against said appellants for the possession of the store room in controversy, from which judgment in the Circuit Court, this appeal is prosecuted to this court.

On the 14 day of August, 1918, appellee entered into a written lease of the premises involved in this cause with the appellants who were husband and wife. The lease was executed in duplicate, the copy retained by appellee being signed by the appellants, and the copy retained by appellants was signed only by James J. Moran, appellee. At the time of entering into the lease, the building was owned by appellee Moran, Herman R. Mohrman and Moses I. Kohler, but before the termination of the lease Mohrman and Kohler sold their interest in the property to the appellee. Appellants in their statement of the case, state that the lease by Moran, Mohrman and Kohler to appellants was never signed

by McGraw and Peltier, and further state that there is no competent evidence in the record by which it is established that Moran purchased the interest of the other lessors in the property covered in and by the lease in question, yet, Moran's right to lease the premises, nor his claims of ownership of the premises involved are not disputed in any manner, nor is any complaint made that there has been any failure to join necessary parties, plaintiff in the suit.

By the terms of the written lease, Appellants leased the premises from September 1, 1913, until September 1, 1918, at a rental of Seventy-five Dollars per month, payable monthly in advance. After the execution of this lease it was agreed by the parties thereto, that the payment of the rent should be on the 15th of each month in advance, instead of on the first day of each month. The contention of appellee is that the change in the time of the payment of rent was agreed upon because appellants were unable to take possession before September 15th. Appellants contend the change was made because appellee wanted the lease to begin on the 15th of the month. Whatever may have been the reason for the change in the time, of paying the rent, from the first to the 15th of September, in advance, it is agreed that the payments were so made during the period of five years, which appellants occupied the premises under the written lease.

After the expiration of the five years, ending on September 15th, 1918, appellants continued to occupy the premises and paid rent at the rate of $75.00 per month in advance. Appellee says that early in 1918, and before the lease expired he informed appellants that he would not renew the lease. Appellant, Sam Bernstein, claims he had no conversation with appellee about the premises before receiving notice to quit and deliver up the premises. Two notices were served by appellee upon the appellants to quit, the first of which was dated and served August 14th, 1919, in which appellee advised appellants he had purchased the interests of McGraw

by defiance and delayed, and further where it there is no conflict evidence in the record by which it is contended that [illegible] unknowing the interest of the other lessors in the proceeding [illegible] and in and by the lease in question, yet, lessee's right to [illegible] the premises, nor his claims of damages of the [illegible] are not disputed in any manner, nor is any complaint made that there has been any failure to join necessary parties, defendant in the suit.

By the terms of the written lease, appellants leased [illegible] rental of twenty-five dollars per month, payable monthly in advance. After the execution of this lease it was agreed by the parties thereto, that the payment of the rent should be on the 15th of each month in advance, instead of on the first day of each month. The contention of appellee is that the change in the time of the payment of rent was agreed upon because they were unable to take possession before September 15th. Appellants contend the change was made because appellee wanted the lease to begin on the 15th of the month. Whatever may have been the reason for the change in the time, of paying the rent, from the first to the 15th of September, in advance, it is agreed that the payment was so made during the period of five years, which appellants occupied the premises under the written lease.

After the expiration of the five years, ending on September 15th, 1918, appellants continued to occupy the premises and paid rent at the rate of $75.00 per month in advance. [illegible] says that early in 1918, and before the lease expired he informed appellants that he would not renew the lease. Appellants, however, claim, claims he had no conversation with appellee about the lease before expiration, nor did he give notice of a lease by the year. Two notices were served by appellee upon the appellants on [illegible] the first of which was served about March 15th, 1918, in which appellee advised appellants he had discussed the business of renting

and Peltier, and that he had elected to terminate their lease and demanded of appellant to deliver possession on or before September 15th, 1919, Appellants remained in possession of the premises and paid rent of $75.00 per month on the 15th of each month in advance. On June 11, 1920, appellee caused the second notice and demand to be served upon appellant to quit and demanded that possession of said premises be surrendered on or before September 15th, 1920. Appellants refused to deliver up possession and continued to occupy the premises. No fent was accepted from and since September 15th, 1920. The suit was thereupon instituted. The only question that arises in this case, on the record, for this court to determine, is whether or not a notice to quit and surrender possession should have specified the first day of September , 1920 as the day for the termination of the lease, instead of September 15th, 1920, and this is a question of fact. There is no controversy with reference to the time when the rent was paid, except that appellants claim to have paid a half month's rent from September 1, 1913, to September 15th, 1913, and this is denied by appellee. It is admitted by both appellee and appellants that the rent was paid each month in advance on the 15th of the month. Since it is contended by appellants that the original lease expired on September 1st, and that under the law, whether the tenancy was one from month to month, or by the year, the notice should have demanded possession on September 1st, and not September 15th, and is likewise contended by appellee that it was agreed that the rental would begin on the 15th of September and end 15 days later, it was proper to submit the question of fact in dispute to the jury, which was done, and the jury has found for the appellee, and we are not prepared to say that the finding was contrary to the evidence. If, as a matter of fact the agreement was made as appellee contends, then it was proper to demand possession on

and Dalton, and that he had elected to terminate their lease and demanded of appellant to deliver possession on or before September 15th, 1919. Appellants remained in possession of the premises and paid rent of $75.00 per month on the 15th of each month in advance. On June 11, 1920, appellee caused the second notice and demand to be served upon appellant to quit and demanded that possession of said premises be surrendered on or before September 15th, 1920. Appellants refused to deliver up possession and continued to occupy the premises. No rent was accepted from and since September 15th, 1920. The suit was thereafter instituted. The only question that arises in this case, on the record, for this court to determine, is whether or not a notice to quit and surrender possession should have specified the first day of September, 1920 as the day for the termination of the lease, instead of September 15th, 1920, and this is a question of fact. There is no controversy with reference to the time when the rent was paid, except that appellants claim to have paid a half month's rent from September 1, 1918, to September 15th, 1918, and this is denied by appellee. It is admitted by both appellee and appellants that the rent was paid each month in advance on the 15th of the month. Since it is contended by appellants that the original lease or term on September 1st, and that under the law, whether the tenancy was one from month to month, or by the year, the notice should have demanded possession on September 1st, and not September 15th, and is likewise contended by appellee that it was agreed that the rental would begin on the 15th of September and 15 days later, it was proper to submit the question of fact in dispute to the jury, which was done, and the jury has found for the appellee, and we are not prepared to say that the finding was contrary to the evidence. If, as a matter of fact the contract was made as appellee contends, when it was proper to demand possession on

September 15th. It was for the jury to say whom the jury would believe; the jury found in favor of the contention of appellee.

Complaint is made of the instruction given by the court on behalf of appellee because it submitted the question to the jury as to whether or not the tenancy was one from month to month. If there is no dispute about the terms of the tenancy in question, whether it was from month to month or by the year, is one for the court, but where the terms are in dispute then it is proper to submit the question to a jury as one of fact.

It will be observed from an examination of appellant's instructions, that they do not materially differ from the instruction of appellee; the only practical difference being the dates specified. The rule is that a party to a suit cannot assign as error the giving of an instruction, when an instruction subtantially the same has been given at his own request.

This doctrine requires no citation of authorities. We, therefore, hold that the notice given in demanding that appellants quit and surrender the premises was sufficient, and the judgment of the circuit court is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson
Clerk of the Appellate Court.

7100

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7100. Agenda 45.

Trade Press Publishing Company,
a Corporation,
appellee,
vs
Thomas-Andrews Company, Appeal from Lake
a Corporation,
Appellant,

Opinion by Jett, J.

This is a suit brought by the appellee in the Circuit Court of Lake County, against the appellant, and appellee recovered a judgment against appellant for the sum of $405. and from which judgment the appellant prosecutes this appeal. The declaration consisted of the common counts. Appellant plead the general issue and filed five special pleas, in and by which it was alleged that the appellee, was a foreign corporation and had not complied with the law of the State of Illinois, with reference to said corporation doing business in Illinois, and that it was not a regularly organized corporation in Illinois or in any other state, and therefore could not maintain a cause of action in this state. That the contract relied upon by appellee was executed without authority from the appellant and that appellant was not bound to pay any money on account of said alleged contract being ultra vires. Issue was joined and a trial had by the court without the intervention of a jury. A number of propositions of law were submitted and passed on by the court.

The questions to be determined are, whether or not the appellee was doing business within the State of Illinois within the meaning of the statute in relation to foreign corporations doing business in this state, and can it maintain this suit? The evidence shows the appellee is a Wisconsin corporation, with headquarters in the city of Milwaukee, and publishes certain magazines among which is the Ford Owner, and that the appellant had certain advertising inserted in the Ford Owner and the bill for this advertising is unpaid. The testimony further establishes the fact that the appellee had an agent in the city of Chicago, who maintained an office in said city; that said agent solicited business and that the contracts obtained by him were sent to the city of Milwaukee where they were ratified by the

Frank-Lewis Distilling Company,
a Corporation,
Appellant,

vs.

Thomas-Lawson Company,
a Corporation,
Appellee.

Appeal from the

Opinion by Cook, J.

This is a bill brought by the appellee in the Illinois Circuit Court against the appellant, and specifically recovers a judgment against appellant for the sum of $600. and from which judgment the appellant prosecutes this appeal. The abbreviation contained of the common counts. Appellees plead the general issues and filed five special pleas, in and by which it was alleged that the appellee, was a foreign corporation and had not complied with the laws of the State of Illinois, with reference to said corporation doing business in Illinois, and that it was not a regularly organized corporation in Illinois or in any other state, and therefore could not maintain a cause of action in this state. That the contracts relied upon by appellee were made in Illinois (illegible) the appellee and that appellee was (illegible) it was not lawful to transact business within the State of Illinois, without being duly licensed and a total and by the court without the intervention of a jury. A number of propositions of law were submitted and passed on by the court.

The questions to be determined are, whether or not the appellee was doing business within the State of Illinois within the meaning of the statute in relation to foreign corporations doing business in this state, and was it (illegible) The evidence shows the appellee is a domestic corporation, with headquarters in the city of Milwaukee, and publishes certain magazines among which is the Word Company, and that the appellant had certain advertising inserted in the last issue and the bill for this advertising is unpaid. The testimony further establishes the fact that the appellee had an agent in the city of Chicago, who maintained a office in that city, that such agent solicited contracts and that the advertisement appearing in the last issue of the city of Milwaukee were only solicited by the agent in the city of Milwaukee.

appellee before they became effective.

The contention of appellee is, that it was engaged in interstate commerce and therefore was not required to qualify under the laws of Illinois, before it could do business in Illinois by way of interstate commerce.

It has been repeatedly held in this state that where a foreign corporation has no established place of business of any kind in this state, and carries on no local business but merely sells its merchandise through the instrumentality of soliciting agents or "drummers" and delivers the same through common carriers in the ordinary course of business, such corporation is not transacting business in this State within the meaning of the statute, requiring foreign corporations desiring admission into the State of Illinois, for the purpose of transacting business or exercising their corporate powers or franchises, to make application to the Secretary of State and comply with certain formalities and conditions prescribed by the law. Kuger Paper Company v. East St. Louis Publishing Company 190 App. 581., Yost Elec. Mfg. Co. v. Cavanaugh-Darley Co., 147 Ill. App. 418; Lehigh Portland Cement Co. V. McLean, 149 id. 360; affirmed in 245 Ill. 326; John Spry Lumber Co. v. Chappell, 184 Ill. 539.

We therefore, hold that the appellee was not doing business in this state, in violation of the laws of the state, and that it had a right to maintain its cause of action in the Circuit Court of Lake County, and that the evidence amply sustains the judgment rendered by the court below and for these reasons the judgment will be affirmed.

Affirmed.

[illegible] before they become effective.

The contention of appellee is, that it was engaged in interstate commerce and therefore was not required to qualify, under the laws of Illinois, before it could do business in Illinois by way of interstate commerce.

It has been repeatedly held in this state that a foreign corporation has no established place of business of any kind in this state, and merely by a local business by agent with its headquarters outside the jurisdiction of Illinois, which is [illegible] and delivers the same through agents [illegible] in the ordinary course of business, such corporation is not transacting business in this state within the meaning of the statute, requiring foreign corporations seeking admission into the State of Illinois, for the purpose of transacting business or exercising their corporate powers or franchises, to make application to the secretary of State and comply with certain requirements. [illegible] Yost Mfg. Co. v. Overmeyer-Bertling Co., 147 Ill. App. 418; [illegible] Cortland Cement Co. v. Nelson, 149 Ill. 380; affirmed in 148 Ill. 386; John Spry Lumber Co. v. Chappell, 154 Ill. 589.

We therefore, hold that the appellee was not doing business in this state, in violation of the laws of the state, and that it had right to maintain its cause of action in the Circuit Court of Lake County, and that the evidence amply sustains the judgment rendered by the court below and [illegible] by plaintiff in error.

[illegible]

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7166

4-1123
7106

2734

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7106 Agenda 51

Herman O. Wessell, Trustee,

appellant,

vs. Appeal from Woodford.

Herman F. Beck,

appellee,

Jett, J.

This is an appeal from a judgment entered in the Circuit Court of Woodford County, against appellant, in an action of assumpsit filed by appellant to recover from appellee the sum of $2500. The case was tried by a jury and a verdict rendered for appellee. The court denied appellant's motion for a new trial and this appeal followed.

Appellant's declaration comprised the common counts and two special counts. The special counts set up, by appropriate averments that on November 14, 1908, John F. Beck, father of the appellee, conveyed to appellee 165 acres of land near Secor in Woodford County by a certain deed (particularly referred to in the declaration), by the terms of which deed the grantee therein (appellee), was required to pay the sum of $2500 within 10 years after the death of John F. Beck to a trustee, elected by the Board of Elders of the German Evangelical Lutheran Church at Secor; that the appellee accepted the deed, took possession of the land and occupied it ever since; that the said John F. Beck died January 12, 1910; that by the terms of said deed said $2500 became due January 12, 1920, and that appellant has been duly appointed, Trustee of said fund, and authorized to bring this suit.

The appellee filed, in addition to the general issue, special pleas denying delivery and acceptance of the deed of his father executed November 14, 1908, and one of which pleas alleged that after the execution of said deed of November 14, 1908, the appellee reconveyed said property, to his father, by deed executed by him-

Sup. No. 7105 Appeals of

[illegible] O. Powell, Trustee,

Appellee,

vs. Appeal from Woodford.

[illegible] F. [illegible],

Appellee.

Hall, J.

This is an appeal from a judgment entered in the Circuit Court of Woodford County, against appellants, in a action of assumpsit filed by appellant to recover from appellee the sum of $8300. The case was tried by a jury and a verdict returned for appellee. The court denied appellant's motion for a new trial and this appeal followed.

Appellant's declaration consisted two counts on its and two special counts. The special counts set up, by appropriate averments that on November 14, 1908, John W. Beck, father of the appellee, conveyed to appellee 185 acres of land near Secor in Woodford County by a certain deed (particularly referred to in the declaration), by the terms of which deed the grantee therein (appellee), was required to pay the sum of $8300 within 10 years after the death of John W. Beck to a trustee, elected by the Board of Elders of the Conemaugh Evangelical Lutheran Church at Secor: that the appellee accepted the deed, took possession of the land and complied in every manner; that the said John W. Beck died January 12, 1910; that by the terms of said deed said $8300 became due January 12, 1920, and that appellant has been duly appointed, Trustee of said fund, and authorized to bring this suit.

The appellee filed, in addition to the general issue, special pleas denying delivery and acceptance of the deed of his father executed November 14, 1908, and one of which pleas alleged that after the execution of said deed of November 14, 1908, the appellee reconveyed said property, to his father, by deed executed by him-

self and his wife, March 3, 1909. This plea also alleged that this deed (claimed by appellee to have been executed March 3, 1909, was delivered to the father and recorded by the father. The affidavit of merits filed with these pleas also states that such deed was "recorded by the father."

John F. Beck, father of the appellee, was, in 1908, a man about 70 years of age, a widower. He had three children -- one son (the appellee), and two daughters, Mary and Elizabeth. He was the owner of 320 acres of rich, black soil farm land located three or four miles from Secor, then worth about $250 an acre; also 5 acres of timmber land, located a few miles from his farm land; also a home in Secor, Illinois, where he was living with his two daughters, both of whom were unmarried. He had lived in Secor for four or five years; prior to his moving to Secor, he lived on his farm lands above referred to, three or four miles from that town. Secor is a village in Woodford County, a few miles from Eureka, the county seat. John F. Beck, had lived the greater part of his life on the above referred to farms, near Secor. He was of German descent, and a member and attendant of the German Evangelical Lutheran Church at Secor. This church conducts a parochial school in Secor, with 40 or 50 pupils in attendance, teaching the same courses of study, and subject to the regulations adopted by the public schools of the county. All of Mr. Beck's children had attended this school. In 1908, the appellee then a man between 40 and 50 years of age was married, living on his father's land as tenant. He had lived there since the father moved from the farm into Secor. The appellee's children also attended this parochial school.

In the fall of 1908, John F. Beck, the father of appellee, made and executed deeds dividing his property among his son, the appellee herein, and his two daughters. The deed to the appellee conveyed 165 acres of land to him and provided that appellee, who was the grantee in the deed, should pay $2500 within 10 years after the death of the grantor to a trustee selected by the board of Elders

self and his wife, March 5, 1909. This plea also alleged that this deed (claimed by appellee to have been executed March 5, 1909, was delivered to the father and recorded by the father. The affidavit of merits filed with these pleas also averred that such deed was "recorded by the father."

John F. Beer, father of the appellee, was, in 1898, a man about 70 years of age, a widower. He had three children -- one son (the appellee), and two daughters, Mary and Elizabeth. He was the owner of 280 acres of rich, black soil farm land located three or four miles from Beer, [illegible] also 5 acres of timber land, located a few miles from his farm land; also a home in Beer, Illinois, where he was living with his two daughters, both of whom were unmarried. He had lived in Beer for four or five years; prior to his moving to Beer, he lived on his farm lands above referred to, three or four miles from that town. Beer is a village in Woodford County, a few miles from Eureka, the county seat. John F. Beer, had lived the greater part of his life on the above referred to farms, near Beer. He was of German descent, and a member and attendant of the German Evangelical Lutheran Church at Beer. This church maintains a parochial school in Beer, with 40 or 50 pupils in attendance, teaching the same courses of study, and subject to the regulations adopted by the public schools of the county. All of Mr. Beer's children had attended this school. In 1898, the appellee then a man between 40 and 50 years of age was married, living on his father's land as tenant. He had lived there since the father moved from the farm into Beer. The appellee's children also attended this parochial school.

In the fall of 1898, John F. Beer, the father of appellee, made and executed deeds dividing his property among his son, the appellee herein, and his two daughters. The deed to the appellee conveyed 165 acres of land to him and provided that appellee, who was the grantee in the deed, should pay $3000 within 10 years after the death of the grantor to a trustee selected by the board of Elders

of the German Evangelical Lutheran Church of Secor, Woodford County, to be used by that church for certain purposes as specified in the deed. This deed was filed for record by John F. Beck and apparently mailed to him from the recorder's office and placed in his safety deposit box in the bank where it is claimed it remained until after his death, where it was found by the appellee. On March 3, 1909, a deed signed by appellee and wife to John F. Beck, was acknowledged before a notary public and was delivered to John F. Beck by the appellee and retained by him until the time of his death in which deed the appellee and wife conveyed to Beck the premises which were originally conveyed to appellee by his father John F. Beck. John F. Beck died in January 1910, and in January 1920 or thereabouts certain conversations were had between the representatives of the German Evengelical Lutheran Church and appellee, relative to the payment of the $2500 mentioned in the deed of November 14, 1908. There is a conflict in the evidence as to what these conversations really were. The witnesses on behalf of the appellant contend that the appellee promised to give a note for the $2500 but this is denied by the appellee. No settlement was reached and this cause was instituted. The first question that arises in the case is whether or not the deed from John F. Beck, to appellee, was accepted or ratified by the appellee. Appellant and appellee have in effect agreed, that the only contested issue in this cause is whether or not the appellee accepted or ratified the voluntary distribution made by his father November 14, 1908, thereby ratifying the deed to him of that date. The evidence shows that the deed was drawn by John F. Beck, executed by him, placed upon record and subsequently found among his effects at the time of his death. The appellee contends that he did not know of the existence of this deed until after his father's death but that his father had told him that he had conveyed certain lands to appellee, and that his father at a later date asked him to reconvey these lands to the father and that as a result of such request, appellee re-conveyed the lands and premises to his father. We are of the

of the German Evangelical Lutheran Church of Deer, Woodford County, to be used by that church for cemetery purposes as specified in the deed. This deed was filed for record by John F. Beck and apparently mailed to him from the recorder's office and found in his safety deposit box in the bank where it is claimed it remained until after his death, where it was found by this appellee. On March 3, 1920, a deed signed by appellee and wife to John F. Beck, was acknowledged before a notary public and was delivered to John F. Beck by the appellee and retained by him until the time of his death in which case the appellee and wife conveyed to Beck the premises which were originally conveyed to appellee by his father John M. Beck. John M. Beck died in January 1920, and in January 1920 or a few months certain conversations were had between the representatives of the German Evangelical Lutheran Church and appellee, relative to the payment of the $2500 mentioned in the deed of November 14, 1908. There is a conflict in the evidence as to what these conversations really were. The witnesses on behalf of the appellees contend that the appellee promised to give a note for the $2500 but this is denied by the appellee. No settlement was reached and this cause was instituted. The first question that arises in the case is whether or not the deed from John F. Beck, to appellee, was accepted or ratified by the appellee. Appellant and appellee have in effect agreed, that the only contested issue in this cause is whether or not the appellee accepted or ratified the cemetery [illegible] made by his father, [illegible], thereby vesting the deed to him on that date. The evidence shows that the deed was drawn by John F. Beck, executed by him, placed upon record and subsequently found among his effects at the time of his death. The appellee contends that he did not know of the existence of this deed until after his father's death but that his father had told him that he had conveyed certain lands to appellee, and that his father at a later date asked him to reconvey these lands to his father and that [illegible] a result of some trouble, [illegible] re-conveyed the lands and premises to his father. We are of the

opinion that it was nedessary that this deed from John F. Beck, to appellee should have been accepted by the appellee in order to make it valid and binding and that the evidence does not sustain the contention of the appellant that the deed was delivered and accepted by appellee. We are also of the opinion that there was not a vested right in the appellant to this $2500 unless the deed was accepted by appellee, and that John F. Beck had a right to terminate the agreement between himself and his son at any time before an acceptance had been made by the appellant of the terms and provisions of the deed.

There is no evidence in this record that there was any acceptance by appellant prior to the time of the reconveyance by the appellee to his father, John F. Beck. That there was not a vested right to this $2500 in controversy in appellant is sustained in McCartney v. Ridgway, 160 Ill. 156,157; also 13 Corpus Juris 713.

Complaint is made of instructions 1 and 2 given on behalf of appellee and to the modification of an instruction offered by appellant and modified by the court and given. The first and second instructions in effect told the jury that if the deed from appellee and wife re-conveying the property to John F. Beck was delivered and accepted by John F. Beck in his life-time then the verdict should be for the appellee. The complaint against these instructions is that they ignore the question of the acceptance and delivery of the deed from John F. Beck to appellee and that they ignore the question of the vested interest which the appellant claims to have had in the alleged trust fund by virtue of that deed. If there was no vested interest in the appellant, and John F. Beck and appellee were at liberty to terminate the alleged trust agreement and cancel the deed, then the instructions as given were correct and there was no error in giving either instruction 1 or 2. It will be observed that we have held that under the record in this case there was no vested interest in appellant in the $2500 and that John F. Beck and appellee were at liberty to terminate the alleged

opinion that it was necessary that this deed from John F. Beck, to appellee should have been accepted by the appellee in order to make it valid and binding and that the evidence does not sustain the contention of the appellant that the deed was delivered and accepted by appellee. We are also of the opinion that there was not a vested right in the appellant to this $2500 unless the deed was accepted by appellee, and that John F. Beck had a right to terminate the agreement between himself and his son at any time before an acceptance had been made by the appellant of the terms and provisions of the deed.

There is no evidence in this record that there was any acceptance by appellant prior to the time of the conveyance by the appellee to his father, John F. Beck. Then there was not a vested right to this $2500 in controversy in appellant is sustained in McCartney v. Kidney, 160 Ill. 164,167; also in Corpus Juris 718.

Complaint is made of instructions 1 and 8 given on behalf of appellee and to the modification of an instruction tendered by appellant and modified by the court and given. The first was second instructions in effect told the jury that if the deed from appellee and wife re-conveying the property to John F. Beck was delivered and accepted by John F. Beck in his life-time then the verdict should be for the appellee. The complaint against these instructions is that they ignore the question of the acceptance and delivery of the deed from John F. Beck to appellee and that they ignore the question of the vested interest which the appellant claims to have had in the alleged trust fund by virtue of that deed. If there was no vested interest in the appellant, and John F. Beck and appellee were at liberty to terminate the alleged trust agreement and cancel the deed, then the instructions as given were correct and there was no error in giving either instruction 1 or 8. It will be observed that we have held that under the record in this case there was no vested interest in appellant in the $2500 and that John F. Beck and appellee were at liberty to terminate the alleged

trust agreement and cancel the deed. What is said relative to instructions 1 and 2 will apply to appellant's modified instruction and given as modified. We recognize that the time at which appellee and wife executed the deed re-conveying the property is very material in this case, but under the undisputed evidence we must consider that it is a valid instrument and was executed on the day which it bears date. Complaint is made of appellee's 6th instruction but we see nothing in this instruction that is erroneous and that would be calculated to mislead the jury in any way. It is further claimed that the verdict is contrary to the evidence. With this contention we cannot agree. The case was fairly submitted to the jury. Taking the instructions as a series the jury was fairly and fully instructed as to the law in the case.

We are of the opinion therefore that the judgment of the lower court should be affirmed.

Affirmed.

trust agreement and cancel the deed. That is said relative to instructions 1 and 2 will apply to appellant's modified instruction and given as modified. We recognize that the time at which appellee and wife executed the deed re-conveying the property is very material in this case, but under the undisputed evidence we must consider that it is a valid instrument and was executed on the day which it bears date. Complaint is made of appellee's 6th instruction but we see nothing in this instruction that is erroneous and that would be calculated to mislead the jury in any way. It is further claimed that the verdict is contrary to the evidence. With this contention we cannot agree. The case was fairly submitted to the jury. Taking the instructions as a series the jury was fairly and fully instructed as to the law in the case.

We are of the opinion therefore that the judgment of the lower court should be affirmed.

AFFIRMED.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of april in the year of our Lord one thousand nine hundred and ~~twenty~~- three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7171 Agenda 69

James J. Toalson, Appellee

vs Appeal from Peoria

A. Jacobson, Appellant,

Opinion by Jett, J.

This is a case instituted by Appellee against Appellant before a Justice of the Peace in Peoria County, on a certain check executed and delivered by Appellant to one August Green, Jr. for the sum of $174.00. Appellee recovered a judgment before the Justice and Appellant appealed to the Circuit Court where the cause was again tried and the issues were submitted to a jury and a finding had for Appellee in the sum of $188.50. Judgment was rendered on the verdict of the jury and Appellant appeals to this Court. Appellant admits he executed the check in question and delivered it to Green but insists that he was acting for one Charles Frankel, and that he was the agent of Frankel. That a man by the name of Kleffman had a contract for a building a school house at Mapleton, Illinois, and Kleffman had assigned his contract to Frankel. Appellant further claims that Green had done some work on the school house for Kleffman and Green wanted something to show what was coming to him when the work was completed, and that in order to give Green something to show the sum that was coming to him Appellant executed and delivered the said check to Green. When the Appellant signed the check he put the letter Agt. after his name and his claim is that in doing so he was representing Frankel. This check came into the hands of Appellee. Appellee states that he received the check from Kleffman and that the said Appellee received the check from it was indorsed by both Green and Kleffman and that the said Appellee received the check from Kleffman in payment of a debt Kleffman owed Appellee. The check was dated ahead for a period of time of between two and three months. The said check bore date September 5, 1920, and from the statement of Appellant the check was issued some time early in

~~July of the~~

Gen. No. 7171 Appeals 68

James T. Taylor, Appellee,

vs. Appeal from Lewis.

A. Jacobson, Appellant.

Opinion by Pratt, J.

This is a case instituted by Appellee against Appellant before a Justice of the Peace in Lewis County, on a certain check executed and delivered by Appellant to one Robert Green, Jr. for the sum of $174.00. Appellee recovered a judgment before the Justice and Appellant appealed to the Circuit Court where the cause was again tried and the issues were submitted to a jury and a finding had for Appellee in the sum of $180.00. Judgment was rendered on the verdict of the jury and Appellant appeals to this Court. Appellant admits he executed the check in question and delivered it to Green but insists that he was acting for one Charles Frankel, and that he was the agent of Frankel. That a man by the name of Kleffman had a contract for a building on school house at Hopkinton, Illinois, and Kleffman had assigned his contract to Frankel. Appellant further claims that Green had done some work on the school house for Kleffman and Green wanted something to show what was coming to him when the work was completed, and that in order to give Green something to show the sum that was coming to him Appellant executed and delivered the said check to Green. When the Appellant signed the check he put the letter A.F. after his name and his claim is that in doing so he was representing Frankel. This check came into the hands of Appellee. Appellee states that he received the check from Kleffman and that ~~Appellee received the check~~ it was indorsed by both Green and Kleffman and that the said Appellee received the check from Kleffman in payment of a debt Kleffman owed Appellee. The check was dated and for a period of time of between two and three months. The said check bore date December 8, 1920, and from the statement of Appellant the check was issued some time early in

July of the same year. There were no written pleadings in this case th suit having been brought originally before a Justice of the Peace, the statement of the case to the jury in effect constitute the pleading. The Appellant in stating his case, as is disclosed by the record, stated that the defense was that there was no consideration for the check. He now insists in this Court that the verdict of the jury was against the weight of the evidence and that the Court erred in giving instructions for the Appellee and in refusing instructions for the Appellant, and that the Appellee was not an innocent holder.

The only evidence in the cause was the check offered by Appellee, and the testimony of the parties to the suit. The claim of failure of consideration is based entirely upon the evidence of Appellant and likewise the charge that the Appellee was not an innocent holder, rests alone upon the testimony of Appellant. Appellant testified to the effect that Appellee came to him after the 5 of September 1920, and that he informed Appellee about the check as above stated and that he did not owe a dime on it and states that he told Appellee to have nothing to do with the check. Appellant claims that notwithstanding this notice, the Appellee took the check after it was due with notice of Appellants defense. Appellee testified that he did not speak to Appellant about this check until after its due date when he went to Appellant for the money due on it. That he got the check from Frank Kleffman; that Kleffman owed him a bill, and he Appellee, accepted the check as payment on the bill; that he spoke to Appellant a few days after he got the check and that he did not speak to Appellant about the check before he got it from Kleffman.

It was for the jury to say whom they would believe. The finding was for Appellee on the questions of fadt, and after a careful examination of the record, we find no reason why their finding should be disturbed. This check was a negotiable instrument, and bore the indorsement of Greenand Kleffman and was in circulation before the maturity date. The trial Court committed no error in giving or refusing instructions.

[illegible] at the same time. There were no written pleadings, the suit having been brought originally before a Justice of the Peace, the statement of the case to the jury in effect constitute the pleading. The appellant in stating his case, as is disclosed by the record, stated that the defense was that there was no consideration for the check. He now insists in this Court that the verdict of the jury was against the weight of the evidence and that the court erred in giving instructions for the Appellee and in refusing instructions for the Appellant, and that the Appellee was not an innocent holder.

The only evidence in the cause was the check offered by Appellee, and the testimony of the parties to the suit. The claim of failure of consideration is based entirely upon the evidence of Appellant and likewise the charge that the Appellee was not an innocent holder, rests alone upon the testimony of Appellant. Appellant testified to the effect that Appellee came to him after the 3 of September 192[illegible], and that he informed Appellee about the check, it never cashed and that he did not owe a dime on it and at the same time he told Appellee to have nothing to do with the check. Appellant claims that notwithstanding this notice, the Appellee took the check after it was due with notice of Appellants defense. Appellee testified that he did not speak to Appellant about this check until after its due date when he went to Appellant for the money due on it. That he got the check from Frank Kleffman; that Kleffman owed him a bill, and he, Appellee, accepted the check as payment on the bill; went to see Appellant a few days after he got the check and that he did not speak to Appellant about the check before he got it from Kleffman.

It was for the jury to say whom they would believe. The finding was for Appellee on the questions of fact, and after a careful examination of the record, we find no reason why their finding should be disturbed. This check was a negotiable instrument, and bore the indorsement of the named [illegible] and was in circulation before its maturity date. The trial court committed no error in giving or refusing instructions.

Complaint is made as to the amount of the verdict. This instrument was past due about two years. We are of the opinion it was proper to allow interest which was done. The Judgment of the Circuit Court is affirmed.

Affirmed.

Complaint is made as to the [illegible]
[illegible] was paid due about two years.
was proper to allow interest which was done.
Circuit Court is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson
Clerk of the Appellate Court.

7081

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Rockford City Traction Company, Appellee,	)	
v.	)	Appeal from the Circuit Court
Fay Motor Bus Company, Appellant.	)	of Winnebago County.

Partlow, J.

Appellee, the Rockford City Traction Company, a corporation, began suit in the circuit court of Winnebago county against the appellant, the Fay Motor Bus Company, a corporation, to recover $3762.40, which appellee had paid to the administrator of the estate of G. Clarence Bailey, deceased, under an award of the Illinois Industrial Commission on account of the death of Bailey, who at the time of his death was a conductor in the employ of appellee. There have been two trials, in each of which a verdict was returned in favor of the appellee for the full amount. After the first hearing a new trial was granted by the trial court, and from the second judgment this appeal was prosecuted.

The evidence shows that prior to October 9, 1919, T. J. Fay, under the name of the Fay Rockford Camp Grant Bus Line, operated about twenty-five motor busses between the City of Rockford and Camp Grant, under an exclusive right issued to him by the United States Government. On October 9, 1919, the Fay Motor Bus Company was organized as a corporation and succeeded to the business, rights and privileges of T. J. Fay. The appellee operated a single track street car line north and south on Kishwaukee Street in the city of Rockford. Just south of the corner of Kishwaukee Street and Lewis Street there was a switch track long enough to allow three street cars to pass. The south bound, or west, track of the switch was within twelve feet of the west curb of the street. On the east side of Kishwaukee Street, opposite the switch, was a signal switch, and when cars passed the switch it was the duty of the conductor

to cross to the east side of the street and throw the switch light so as to indicate that the track was occupied. E. A. Howard owned three busses which he operated as a part of the appellant system. One of these busses was No. 36. On the morning of January 31, 1920, Howard was driving bus No. 36 south on Kishwaukee Street. As he came to the switch just south of Lewis Street he saw a street car standing on the west switch track. The weather was cold and the ground was covered with snow. Some of the snow had been swept from the street car track in the direction of the west curb, and Howard claimed that the space between the west track and the curb was filled with snow to such an extent that he could not pass on the west side of the street car. He attempted to pass on the left, or east side of the street car, and just as the front end of the bus came opposite the south, or front end of the street car, Bailey, the conductor of the street car, intending to throw the switch light on the east side of Kishwaukee Street, started east across the street from the front end of the street car. He was struck by the bus, knocked down and dragged ten or twenty feet and received injuries from which he died. Both appellant and appellee were operating under the Compansation Act. The administrator of Bailey's estate filed a claim for compensation against the appellee and the Industrial Commission made an award which appellee paid and this suit is to recover from appellant the amount so paid.

The first count of the declaration charges general negligence on the part of the appellant. The second and third counts were withdrawn, but more than a year after the accident an additional count was filed charging a violation of an ordinance of the city of Rockford which provided that any vehicle, overtaking a street car, should pass on the right hand side of such car. The appellant filed the general issue, and certain special pleas in which appellant denied that it owned, ran, managed, or controlled the bus which caused the death of Bailey. A plea of the statute of limitations was filed to the second additional count. A demurrer was sustained to this plea and appellant elected to stand by the plea.

to cross to the east side of the street and throw the switch light so as to indicate that the track was occupied. ... a. Howard owned three buses which he operated as a part of the accident system. One of these buses was No. 35. On the morning of January 31, 1920, [illegible] standing on the west switch track. The weather was cold and the ground was covered with snow. Some of the snow had been from the street car track in the direction of the west curb, and Howard claimed that the space between the west track and the curb was filled with snow to such an extent that he could not pass on the east side of the street car. He attempted to pass on the left, or east side of the street car, and just as the front end of the bus came opposite the south, or front end of the street car, Lindsay, the conductor of the street car, listening to throw the switch light on the east side of Riverview Street, started car across the street from the front end of the street car. He was struck by the bus, knocked down and dragged ten or twenty feet and received injuries from which he died. Both appellants and appellee were [illegible] Riverview Street. [illegible] and appellee [illegible] Riverview Street [illegible] indemnity contract made an award which appellee [illegible] suit is to recover from appellant the amount so paid.

The first count of the declaration charges general negligence on the part of the appellant. The second and third counts were withdrawn, but more than a year after the accident an additional count was filed charging a violation of an ordinance of the city of Louisville which provided that any vehicle, overtaking a street car, should pass on the right hand side of such car. The appellant filed the general issue, and certain special pleas in which appellant denied that it owned, ran, managed, or controlled the bus which caused the death of Lindsay. A plea of the statute of limitations was filed to the second additional count. A demurrer was sustained to this plea and appellant elected to stand by the

At the close of the evidence on behalf of appellee and again at the close of all the evidence, a motion was made by appellant to direct a verdict in its favor. These motions were overruled and these rulings are assigned as error. Appellant insisted that these motions should have been sustained, because it did not own, run, operate or control the bus in question, but it belonged to Howard and was being operated by him at the time of the accident and he alone was liable.

The evidence shows that these three busses owned by Howard were of the same general type and construction as the ones owned and operated by the appellant, and had painted upon them the name "Fay Rockford Camp Grant Bus Line", or other similar name, and that all of them had painted upon the the name "Fay" and"Bus". The license for the bus in question was issued to the appellant by the secretary of state upon an affidavit sworn to by Fay as the president of the company, and the company was allgged to be the owner of the bus. The appellant took out and paid for the Rockford city wheel tax, together with liability insurance, both of which were in the name of the appellant. The appellant printed tickets which had its name on them, and these tickets were received by Howard and his drivers as fares and were turned into the office of the appellant, and the amount of cash represented by the tickets was paid daily by appellant to Howard. The busses of Howard were dispatched, or sent out, on trips by the dispatcher of the appellant, and they took regular turns in the discretion of the dispatcher with busses belonging to the appellant. Fay testified that he had negotiated with the city of Rockford to obtain the rightto operate upon the streets of Rockford, and with the utilities commission for a franchise for his busses in the city of Rockford, and thatthis was done after the company was incopporated and prior to the time of the accident. Howard paid $25.00 a week to operate the busses between Rockford and Camp Grant for the reason that he could not operate unless he had Fay's consent for such operation. When the busses belonging to Howard were not in operation, they were housed in the

same garage with the Fay motor busses. The drivers of the appellant's busses made trip reports, and Howard and his drivers made the same reports on blanks furnished by the appellant, and the appellant kept these reports in its files, showing the number of passengers they had on each trip and what time the bus left and when it came back. On the day of the accident there were between eighteen and twenty-five busses dispatched from the appellant's garage. The bus in question remained in the custody of the appellant for some little time after the accident. The evidence clearly shows that the appellant's driver violated the ordinance of the city of Rockford in passing to the left of the street car instead of to the right of it. It was a question of fact for the jury whether the space to the west of the street car was so blocked with snow that the bus could not pass. There was evidence fairly tending to show that this place was not blocked with snow sufficiently to prevent the bus from passing to the right of the street car. If Bailey had been a passenger of the bus which caused his death, there could be no question as to the liability of the appellant.

From all of this evidence we think the fair inference is that the bus which caused this accident was being operated by the appellant as a part of its system of busses, and while it may have belonged to Howard, yet it was being operated by appellant for profit, and appellant was guilty of the negligence charged in the declaration. The evidence supports the charges in the declaration and for this reason the trial court properly refused to direct a verdict.

Appellant insists the court improperly permitted the witness Evans to testify that the bus in question was known as a Fay bus; that there was no difference between the lettering on the bus in question and on other busses operated by appellant; that there was room for busses to pass between the street car and the west side of the street; also that the court committed error in permitting the witness Peterson to testify that he had, before that day, seen what were know as Fay busses on that street, and that he

same garage with the Ivy motor busses. The drivers of the appellant's busses made trip reports, and Howard and his drivers made the same reports on blanks furnished by the appellant, and the appellant kept these reports in its files, showing the number of passengers they had on each trip and what time the bus left and when it came back. On the day of the accident there were between eighteen and twenty-five busses dispatched from the appellant's garage. The bus in question remained in the custody of the appellant for some little time earlier the accident. The evidence clearly shows that the appellant's driver violated the ordinance of the city of Rockford in passing to the left of the street car instead of to the right of it. It was a question of fact for the jury whether the space to the west of the street car was so blocked with snow that the bus could not pass. There was evidence fairly tending to show that this place was not blocked with snow sufficiently to prevent the bus from passing to the right of the street car. If Bailey had been a passenger of the bus which caused his death, there could be no question as to the liability of the appellant.

From all of this evidence we think the fair inference is that the bus which caused the accident was fully controlled by the appellant as a part of its system of busses, and while it may have belonged to Howard, yet it was being operated by appellant for profit, and appellant was guilty of the negligence charged in the declaration. The evidence supports the charges in the declaration and for this reason the trial court properly refused to direct a verdict.

Appellant insists the court improperly permitted the witness Evans to testify that the bus in question was known as a Ivy bus; that there was no difference between the lettering on the bus in questions and on other busses operated by appellant; that there was room for busses to pass between the street car and the west side of the street; also that the court committed error in permitting the witness Peterson to testify that he had, before that day, seen what were know as Ivy busses on that street, and that he

was improperly permitted to testify to the length of time he had been in the habit of taking a ride in the Fay busses. The objection to these answers is that they are conclusions and do not state facts. These items of evidence are picked out of the record at various places, but when the record is read in its entirety, the evidence complained of is not subject to th objection that it was merely the conclusions of the witnesses. We think the answers were properly admissible as statements of fact.

On the first trial, T. J. Fay was called as witness for the appellant and testified to certain facts relative to the operation of the appellant's busses. On the second trial Fay was not present, and the court, over the objection of appellant, permitted the court reporter to read to the jury a part of the evidence of Fay given on the former trial. The contention of appellant is that this evidence was only admissible in case the witness was dead or was insane. Fay was the president of the appelant company. His testimony on the former trial was on behalf of the appellant, was an admission against interest, and was competent to be proved by any one who heard the admission, whether such person be the court reporter or any other person who happened to be present and heard the testimony. Scovill Mfg. Co. v. Cassidy, 275 Ill. 462.

The court permitted Howard to testify that he ran two busses in the Fay bus line, but refused to permit him to answer that he operated two busses on that line, and this ruling is assigned as error. The first answer fully covered the question as to the manner in which the busses were operated, and in addition thereto the witness described under what circumstances the busses were operated and thus fully answered the question complained of. It is also contended that the court improperly refused to permit Howard to testify concerning the sale of his busses after the accident. It was immaterial, as far as the question at issue in this case was concerned, what disposition Howard may have made of his busses after the accident. The only question at issue was whether or not this bus was being operated in such a way as to constitute a part of appellant's bus line and

was improperly permitted to testify to the truth of time he had
been in the habit of taking a ride in the Ky, Bunnes. The objection
to these answers is that they are conclusions and do not state
facts. These items of evidence are picked out of the record at
various places, but when the record is read in its entirety, the
evidence complained of is not subject to the objection that it
was merely the conclusions of the witnesses. We think the answers were
properly admissible as statements of fact.

On the first trial, D. C. Ky was called as witness for
the appellant and testified to certain facts relative to the
operation of the appellant's bunnes. On the second trial Ky was
not present, and the court, over the objection of appellant, permitted
the court reporter to read to the jury the evidence of Ky given in the
trial on the former trial. The propriety of this practice is not
raised on the former trial. The propriety of this practice is not
[illegible] evidence was duly admitted in the trial on the former
[illegible] time. Ky was not qualified to be a material witness. He
testimony on the former trial was in effect a confession.
was an admission against interest, and was competent to be proved
by any one who heard the admission, whether such person be the
court reporter or any other person who happened to be present and
heard the testimony. Scovill Mfg. Co. v. Dunstay, 172 Ill. 468.

The court permitted Howard to testify that in the Ky bus line, Bill
[illegible] operated two buses on the [illegible] route, [illegible] assumed no error.
The first witness fully stated the facts as to the manner in which
the buses were operated, and in addition thereto the witness described
under what circumstances the buses were operated and thus fully
answered the question complained of. It is also contended that the
court improperly refused to permit [illegible] to testify as to
[illegible] at his bunnes after the accident. In any event, [illegible]
the question at issue in this case was concerned, what discussion
Howard may have made of his bunnes after the accident. The only
question at issue was whether or not Ky was [illegible] one stand in
such a way as to constitute a part of appellee's [illegible].

render appellant liable. The court refused to permit the witness Keiser to testify whether he knew that Howard operated other busses in the city of Rockford on the day of the accident, and refused to permit the witness to testify what Howard was doing in the city of Rockford in the latter part of December, 1919, and the first part of January, 1920. The witness was then asked what he wasd doing on January 1, 1920, and the court sustained the objection on the ground that the inquiry should be brought down to the day of the accident and as to the manner in which this particular bus was being operated. The court excluded the evidence as to the operation of other busses by Howard as immaterial, and refused to permit the witness to testify concerning the reports which were made by the witness relative to the operation of other busses by Howard. We do not think there was any error in any of these rulings. The court limited the examination to the questions at issue in the case and properly excluded all other evidence.

Complaint is made of instructions A and B on the ground that they negative the probative force of any evidence of ownership that the jury had the right to consider the evidence as to ownership in connection with all the other evidence in thecase. The instructions as given stated correct rules of law applicable to the facts in the case. It was entirely immaterial who owned the bus in question. If it was being operated at the time of the accident as a part of the appellant's bus system, then the fact that Howard owned the bus was immaterial as far as appellant's liability was concerned. Our attention is called to an instruction on page 66 of the abstract which it is calimed was erroneous. This instruction is not peferred to by number and we have been unable to find any instruction on the page referred to which meets the objection made by the appellant.

Compalint is also made of the refusal of the court to give the fourteenth instruction offered on behalf of the appellant. This instruction told the jury that pedestrians using the streets for the purpose of travel are bound to use that degree of care to

render appellant liable. The court refused to permit the witness Keaser to testify whether he knew that Howard operated other busses in the city of Hoefford on the day of the accident, and refused to permit the witness to testify what Howard was doing in the city of Hoefford in the latter part of December, 1919, and the first part of January, 1920. The witness was then asked what he was doing on January 1, 1920, and the court sustained the objection on the ground that the inquiry should be brought down to the day of the accident and as to the manner in which this particular bus was being operated. The court excluded the evidence as to the operation of other busses by Howard as immaterial, and refused to permit witness to testify concerning the reports which were made by the witness relative to the operation of other busses by Howard. We do not think there was any error in any of these rulings. The court limited the examination to the questions at issue in the case and properly excluded all else.

Complaint is made of instructions A and B on the ground that they negative the probative force of any evidence of ownership that the jury had the right to consider the evidence as to ownership in connection with all the other evidence in the case. The instructions as given stated correct rules of law applicable to the facts in the case. It was entirely immaterial who owned the bus in question. If it was being operated at the time of the accident as a part of the appellant's bus system, then the fact that Howard owned the bus was immaterial as far as appellant's liability was concerned. Our attention is called to an instruction on page 65 of the abstract which it is claimed was erroneous. This instruction is not referred to by number and we have been unable to find any instruction on the page referred to which covers the objection made by the appellant.

Complaint is also made of the refusal of the court to give the fourteenth instruction offered on behalf of the appellant. This instruction told the jury that pedestrians using the street for the purpose of travel are bound to use that degree of care to

prevent accidents to themselves as a reasonable and cautious person would use under the same or similar circumstances. This instruction was not applicable to the facts in this case. Bailey was not a pedestrian using the street as stated in the instruction. He was the conductor of a street car and was crossing the street in the exercise of his duties as an employee of the appellee. If he expercised due care and caution for his own safety at the time and just prior to the accident that was all which the law required of him. There is no evidence on which to base this instruction and it was properly refused.

The additional count to the declaration was filed more than one year after the accident. A plea of the statute of limitations was filed to this additional count. A demurrer was sustained to the plea. This error is mentioned in the briefs and arguments but as it is not argued we will consider it as waived.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7113

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on Jan. 24, 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

People of the State of Illinois,

Defendant in Error,

vs. Error to County Court

Paul Bein, otherwise known as of Lake

Duke Bein,

Plaintiff in Error.

Partlow, J.

Plaintiff in error, Paul Bein, was found guilty in the county court of Lake county on three counts of an information charging a violation of the Search and Seizure Act. Two counts charged the sales of intoxicating liquor, and one count charged the unlawful keeping for sale of intoxicating liquor. He was fined an aggregate of $750.00 and sentenced to jail for ninety days. To review the judgment a writ of error has been prosecuted from this court.

Two witnesses testify that on May 28, 1921, they went to the hotel of the plaintiff in error, at Fox Lake, and saw persons on the premises who were under the influence of intoxicating liquor, and that each witness purchased a drink of whiskey for which he paid seventy-five cents. C. A. Brune, a constable of Lake county, on May 25, 1921, went to the hotel with a search warrant and found seven and one-half barrels of beer which, upon analysis, was found to contain more than one-half of one per cent alcohol by volume. Plaintiff in error admits that he was the proprietor of the hotel and that the beer was found in his possession, but denies that he made the sales to the two witnesses who testified for the People. Under this evidence there can be no doubt of the guilt of the plaintiff in error on the charges upon which he was convicted.

On cross examination of the state's witness, Schleicher, he was asked several times how he knew the liquor he purchased was whiskey. After answering this question several times he was again asked the same question. Objection was made to the question on

People of the State of Illinois,

Defendant in Error,

vs.

Earl Bain, otherwise known as of Lake

Plaintiff in Error.

Plaintiff in error, Earl Bain, was found guilty in the county court of Lake county on three counts of an information charging a violation of the Search and Seizure Act. The counts charged the sales of intoxicating liquor, and one count charged the unlawful keeping for sale of intoxicating liquor. He was fined an aggregate of $750.00 and sentenced to jail for ninety days. To review the judgment a writ of error has been prosecuted from this court.

Two witnesses testify that on May 24, 1921, they went to the hotel of the plaintiff in error, at Fox Lake, and saw persons on the premises who were under the influence of intoxicating liquor, and that each witness purchased a drink of whiskey for which he paid seventy-five cents. O. A. Dawes, a constable of Lake county, on May 26, 1921, went to the hotel with a search warrant and found seven and one-half barrels of beer which, upon analysis, was found to contain more than one-half of one per cent alcohol by volume. Plaintiff in error admits that he was the proprietor of the hotel and that the beer was found in his possession, but denies that he made the sales to the two witnesses who testified for the People. Under this evidence there can be no doubt of the guilt of the plaintiff in error on the charges upon which he was convicted.

On cross examination of the State's witness, Schleicher, he was asked several times how he knew the liquor he purchased was whiskey. After answering this question several times he was asked the same question. Objection was made to the question

the ground that the witness had already answered it, and the court replied that he thought the witness had answered the question. Plaintiff in error insists that it was improper for the court to state that the witness had so testified. The record does not show that the court stated what the witness had testified to, but the court simply stated that the question asked had been answered several times. The court was correct in this statement. The remark made by the court was not error, and it was the duty of the court to prevent the repetition of the question.

Complaint is made of two remarks made by the state's attorney in his argument to the jury. Objections were sustained to each of them. The entire argument to the jury does not appear in the abstract but these remarks are singled out of the entire argument and the connection in which they were used does not appear. It is contended by the defendant in error that the remarks were in reply to statements made by counsel of plaintiff in error. In this condition of the record, it is impossible for us to determine whether the remarks were proper or not. Even if they were improper, objection was sustained to them and the court placed his disapproval on them.

The information was verified by the affidavit of the state's attorney. The state's attorney was called as a witness by plaintiff in error and testified that he did not swear to the facts contained in the affidavit of his own personal knowledge, but that he derived his knowledge from what people had told him. Plaintiff in error insisted that the information was not properly verified, as required by the statute, was in violation of Section 6 of the Bill of Rights, and for that reason the court should have granted the motion for a new trial and in arrest of judgment. It is also contended by plaintiff in error that for these reasons a constitutional question is involved. If a constitutional question was involved, such question was waived when a writ of error was prosecuted from this court. People v. Powers, 283 Ill. 438. Even if this court had power to consider this as a constitutional question, the contention

the ground that the witness has already answered it, and the court replied that he thought the witness had answered the question. Plaintiff in error insists that it was improper for the court to state that the witness had so testified. The record does not show that the court stated what the witness had testified to, but the court simply stated that the question which had been answered several times. The court was correct in this statement. The remark made by the court was not error, and it was the duty of the court to prevent the repetition of the question.

Complaint is made of two remarks made by the state's attorney in his argument to the jury. Objections were sustained to each of them. The entire argument to the jury does not appear in the abstract but these remarks are singled out of the entire argument and the connection in which they were used does not appear. It is contended by the defendant in error that the remarks were in reply to statements made by counsel of plaintiff in error. In this condition of the record, it is impossible for us to determine whether the remarks were proper or not. Even if they were improper, objection was sustained to them and the court placed his disapproval on them.

The information was verified by the affidavit of the state's attorney. The state's attorney was called as a witness by plaintiff in error and testified that he did not swear to the facts contained in the affidavit of his own personal knowledge, but had received his knowledge from what people had told him. Contending in error insisted that the information was not properly verified, as required by the statute, was in violation of Section 6 of the Bill of Rights, and for that reason the court should have granted the motion for a new trial and in arrest of judgment. It is also contended by plaintiff in error that for the so reason a constitutional question is involved. If a constitutional question was involved, [illegible] question was waived when a writ of error was prosecuted from this court. [illegible] power to consider this as a constitutional question, the contention

of plaintiff in error has been determined contrary to his claim in People v. Kennedy, 303 Ill. 423, where the facts are almost identical with those here presented and the Supreme Court held that the information in that case was properly verified as required by the statute.

The judgment provided that the plaintiff in error be confined in the county jail until the fine and costs were paid, or were worked out at the rate of $1.50 per day, or until the plaintiff in error be otherwise discharged according to law. Plaintiff in error contends that imprisonment at hard labor renders the offense punishable thereby infamous, regardless of the place of the imprisonment, so that the prosecution for an offense which may be punished by imprisonment at hard labor can only be sustained by the presentment of an indictment by a grand jury under the fifth amendment of the constitution of the United States, and several federal cases are cited in support of this contention. The constitution of Illinois contains no provision similar to the fifth amendment to the federal constitution. Section 8, article 2 of the constitution of Illinois provides that "No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary." Under this section it has been repeatedly held that it is lawful to try a person charged with the offense with which the plaintiff in error was charged, by filing an information, and the requisites concerning the return of an indictment are dispensed with in cases of this character because the punishment provided for is by fine or imprisonment, otherwise than in the penitentiary. Parris v. People, 76 Ill. 274. Gallagher v. People, 120 Ill. 179. People v. State Reformatory, 148 Ill. 413. Paulsen v. People, 195 Ill. 507. People v. Slowacki, 236 Ill. 612.

Plaintiff in error complained that the court improperly compelled him to exercise his last peremptory challenge on the juror Stripe. It is claimed by the plaintiff in error that this juror

stated upon his examination that he had known the state's attorney for twenty-five years and that if the state's attorney swore the facts set forth in the information were true, he would believe the statements sworn to by the state's attorney; that on account of this statement by the juror, the court should have permitted the plaintiff in error to challenge the juror for cause. From our examination of the record we do not think the plaintiff in error has correctly interpreted the answer of the prospective juror. The most that can be said of the answer is that the juror stated that he did not believe the state's attorney would sign the information and swear to it unless he believed it was true. This answer is entirely different from the construction placed upon it by the plaintiff in error, was not sufficient to support a challenge for cause, and the court properly refused to sustain the challenge. After the court refused to permit the juror to be challenged for cause, the plaintiff in error challenged him peremptorily, and it is claimed by the plaintiff in error that this was his last challenge and therefore he was required to accept a juror who was hostile. This contention is not sustained by the record. The juror Stripe was a competent juror under the facts testified to by him. After he was challenged, another juror was called in his place. The examination of this juror does not appear in the record and from all that appears he was a fair and impartial juror and was competent to try the case. Even if the challenge of Stripe was not properly sustained, there was no injury to the plaintiff in error because of that fact.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

stated upon his examination that he had known the state's attorney for twenty-five years and that if the state's attorney swore the facts set forth in the information were true, he would believe the statements sworn to by the state's attorney; that on receipt of this statement by the juror, the court should have permitted the plaintiff in error to challenge the juror for cause. From our examination of the record we do not find the juror is shown to have stated that he would not believe the statements of the state's attorney if sworn to by him. The most that can be said of the answer is that the juror stated that he did not believe the state's attorney would swear to it unless he believed it to be true. This answer is not sufficient to establish a disqualification in error, nor is it sufficient to support a challenge for cause, and the court properly refused to permit the challenge after the juror had stated he could not be influenced by the answer, the plaintiff in error challenged the peremptorily, and it is contended by the plaintiff in error that this was the last challenge and therefore it was reversible error to overrule a proper challenge. This proposition is fully established by the record. The juror Strine was a competent juror under the facts established by him. After he was challenged, another juror was sworn in his place. The examination of this juror does not appear in the record and from all that appears he was a fair and impartial juror and was competent to try the case. Even if the challenge of Strine was not properly sustained, there was no injury to the plaintiff in error because of that fact.

In this or a reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson
Clerk of the Appellate Court.

1124

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ralph Basford,

Appellee,

vs. Appeal from Winnebago

Rockford & Interurban Railway Company,

Appellant,

Partlow, J.

Appellee, Ralph Basford, obtained a judgment for $9000.00 in the circuit court of Winnebago county against the appellant, the Rockford & Interurban Railway Company, for personal injuries sustained by appellee in a collision between a street car of the appellant and the motorcycle on which appellee was riding, and from that judgment an appeal has been prosecuted to this court.

The first ground of reversal urged is that the verdict is contrary to the evidence and that the evidence shows that the appellee was guilty of contributory negligence. The evidence shows that on November 17, 1920, the day of the accident, the appellee lived several miles north of the city of Rockford in a suburb known as Lover's Park. The appellant operated an interurban railroad north and south through the suburb. The track was parallel to and about fifteen feet east of a public highway known as North Second Street Road. Just east of appellant's track and facing west, was the home of appellee. The front fence was five or six feet east of the east rail of the track. The west end of the house was about fifteen feet from the front fence and about twenty feet from the east rail of the track. Just inside of the fence there were a few lilac bushes and a couple of fruit trees standing between the fence and the house. Along the north side of the house was a driveway extending from the public highway east to the barn which was fifteen or twenty feet east of the house. On the morning in question it was dark, cold, misty or raining. Appellee was employed in the city of Rockford

Partlow, J.

Appellee, Ralph Bedford, obtained a judgment for $25,000 in the circuit court of Winnebago county against the appellant, the Rockford & Interurban Railway Company, for personal injuries sustained by appellee in a collision between a street car of the appellant and the motorcycle on which appellee was riding, and from that judgment an appeal has been prosecuted to this court.

The first ground on reversal urged is that the verdict is contrary to the evidence and that the evidence shows that the appellee was guilty of contributory negligence. The evidence shows that on November 17, 1920, the day of the accident, the appellee lived several miles north of the city of Rockford in a suburb known as Lover's Park. The appellant operated an interurban railroad north and south through the suburb. The track was parallel to and about fifteen feet east of a public highway known as North Second Street Road. Just east of appellant's track and facing west, was the home of appellee. The front fence was five or six feet east of the east rail of the track. The west end of the house was about fifteen feet from the front fence and about twenty feet from the east rail of the track. Just inside of the fence there were a few lilac bushes and a couple of fruit trees standing between the fence and the house. Along the north side of the house was a driveway extending from the public highway east to the barn which was fifteen or twenty feet east of the house. On the morning in question it was dark, cold, misty or raining. Appellee was employed in the city of Rockford

and had to be at his place of business at six o'clock in the morning. He got up at five o'clock in the morning, before daylight, dressed, went to the barn and got his motorcycle. He then went into the house and got his dinner bucket and started out of the driveway, west on his motorcycle. His headlight threw a light two hundred to three hundred feet ahead of him. He testified that he started in low speed, about five or six miles per hour, and as he traveled from the west end of the house to the track, he looked to the north and to the south to see if a car was coming. He testified that he saw no car until the front wheel of his motorcycle was practically on the east rail of the track, when he say the car for the first time going north; that he did not have time to escape and was struck and injured. There was evidence tending to show that the car was not on a regular run; that it was backing up to Lover's Park to pick up workmen to take them to Rockford; that there was no headlight on the rear end of the car, but there were some red lights on the rear end; that the car was backing up at a rate of speed of about twenty-five miles per hour; that there was a light in the car, but there was a conflict in the evidence as to how brightly it was burning. The most serious injury to appellee was the breaking of the femur. He was confined to his bed for a long period of time, underwent several operations and the evidence tends to show that his injuries are permanent. He was making $5.75 per day at the time of his injury, and was unable to work from November 17, 1920 until the day of the trial, May 3, 1922.

The first count of the declaration charges general negligence. The second count charges that at the time the car was backed upon the plaintiff, it was five o'clock in the morning, and it was dark, and the car was backed across the private driveway used by the plaintiff, and the car was not lighted and had no light of any kind or character on the back end of the car to warn the appellee of its approach. The third count is a wilful and wanton count.

To the declaration the appellant filed the general issue.

The question as to whether the evidence sustained the allegations of the declaration, and the question as to whether appellee was in the exercise of due care, were questions of fact for the jury. There is no dispute as to the location of appellee's house, the tracks of the appellant and the distances between the various points. It is not disputed that appellant's car was run backwards and that there was no headlight on the north end. There is some dispute as to the rate of speed of the car, as to the amount of light in the car, and whether a bell or whistle was sounded. From all the evidence the jury was justified infinding that the allegations of negligence, as charged in the declaration, were proven.

As to the degree of care of appellee, it is undisputed that as he drove out of his yard, his headlight was burning and threw a ray of light almost two hundred feet across the track and it should have been seen by appellant's servants operating the car; that there were obstructions between the west end of his house and the appellant's tracks; that it was dark and raining and the weather was cold. Whether he should have seen the car and could have stopped his motorcycle in time to have avoided the accident were within the province of the jury to determine. Unless we can say that the finding of the jury is against the weight of the evidence, it is out duty to affirm the judgment. We think that considering all the evidence, it shows that the appellee was in the exercise of due care and caution for his own safety just prior to and at the time of the accident.

Appellee was permitted to testify that it had been about two months since he could walk on his foot without a cane or crutch, and that he could not bend his knee. It is insisted that the answers were self-serving, and were the conclusions of the witness. Whether or not it was two months since he was able to walk on his foot without a cane or crutch was not the conclusion of the witness, but was a statement of fact which was within his

To the Lockwoodian and Wyckham lines the question lessens.

The question as to whether the evidence warranted the allegations of the complaint, and the question as to whether Appellee was in the exercise of due care, were questions of fact for the jury. Their is no dispute as to the location of Appellee's house, the tracks of the appellant and the distances between the various points. It is not disputed that appellant's car was traveling and that there was no obstruction to its view, or which in some degree excuses by the view of light in the car, and whether a bell or whistle was sounded. From all the evidence the jury was justified believing that the allegations of negligence, as charged in the complaint, were proven.

As to the degree of care of appellee, it is undisputed that as he alone had at his back, the railroad was traveling the [illegible] a key of light almost two hundred feet behind him. If [illegible] should have been seen by appellant's servants operating the car, that there was obstructions between the west end of his house and the appellant's tracks; that it was dark and raining and the weather was cold. Whether he should have been the car and could have stopped his motorcycle in time to have avoided the accident was within the province of the jury to determine. Unless we can say that the findings of the jury is against the weight of the evidence, it is out duty to affirm the judgment. We have that something all the evidence, it shows that the appellee and in the exercise of due care and caution for his own safety just prior to and at the time of the accident.

Appellee was permitted to testify that it had been about two months since he could walk on his foot without a cane or crutch, and that he could not bend his knee. It is insisted that his answers were self-serving, and were the conclusions of the witness. Whether or not it was the results alone of his accident walk on his foot without a cane or crutch the [illegible] of the witness, but was a statement of fact which was [illegible]

knowledge and which he had a right to testify to. It is also a question of fact whether he could or could not bend his knee.

Five X-ray pictures of appellee's injuries, taken at various times, covering a period of several months, were admitted in evidence. The objection to them is that there was no evidence that they were correct photographic reproductions of the things they purported to show; that there should have been preliminary proof as to their correctness; and that their introduction was prejudicial to the appellant. Photographs taken by the X-ray process are admissible in evidence after proper preliminary proof has been made of their correctness and authenticity. The Chicago and Joliet Electric Railway v. Spence, 213 Ill. 20. No such proof was made in this case of the correctness or authenticity of these exhibits and they should not have been admitted in evidence without such proof, but we do not think any injury was done to the appellant by that fact. The physicians who attended appellee testified fully as to the extent of his injuries, what operations were performed on him, and what condition he was in at the time of the trial. This evidence fully covered any facts which might have been revealed by the X-ray photographs, hence there was nothing in the X-rays which would tend to shock the layman or create any impressions of greater injuries, as claimed by the appellant.

Complaint is made of the sixth, seventh and eighth instructions given on behalf of the appellee. We have read each of these instructions carefully and have considered them in the light of the objections made against each and are of the opinion that they are substantially correct and are not subject to the criticisms made against them.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

knowledge and which he had a right to testify to. It is also a question of fact whether he could or could not hear his knee.

Five X-ray pictures of appellee's injuries, taken at various times, covering a period of several months, were admitted in evidence. The objection to them is that there was no evidence that they were correct photographic reproductions of the things they purported to show; that there should have been preliminary proof as to their correctness; and that their introduction was prejudicial to the appellant. Photographs taken by the X-ray process are admissible in evidence after proper preliminary proof has been made of their correctness and authenticity. The Chicago and Joliet Electric Railway v. Spence, 213 Ill. 80. No such proof was made in this case of the correctness or authenticity of these exhibits and they should not have been admitted in evidence without such proof, but we do not think any injury was done to the appellant by that fact. The physicians who attended appellee testified fully as to the extent of his injuries, what operations were performed on him, and what condition he was in at the time of the trial. This evidence fully covered any facts which might have been revealed by the X-ray photographs, hence there was nothing in the X-rays which would tend to enable the layman or create any impression of greater injuries, as claimed by the appellant.

Complaint is made of the sixth, seventh and eighth instructions given on behalf of the appellee. We have read each of these instructions carefully and have considered them in the light of the objections made against each and are of the opinion that they are substantially correct and are not subject to the criticisms made against them.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson
Clerk of the Appellate Court.

7131

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

3

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,

Defendant in Error,

vs. Error to County Court

Charles Krahenbuhl, of Lee

Plaintiff in Error.

Partlow, J.

The plaintiff in error, Charles Krahenbuhl, was found guilty in the county court of Lee county on three counts of an information charging him with a violation of the Prohibition Act, and was sentenced to pay a fine of $200.00 and costs and be confined in the county jail for sixty days. To review that judgment a writ of error has been prosecuted from this court.

The information contained four counts. The first and second counts were identical and charged the defendant with unlawfully and knowingly selling intoxicating liquor. The third count charged the unlawful possession of intoxicating liquor, and the fourth count charged the unlawful manufacture of intoxicating liquor. The verdict of the jury was as follows: "We, the jury, find the defendant guilty as charged in the three counts of the information." The court sentenced the defendant upon the first, third and fourth counts. It is the contention of the plaintiff in error that the verdict is so defective that it will not sustain the judgment. In Chicago and Alton Railroad Co. v. The People, 82 Ill. App. 679, on page 683, the court said: "In the case of an indictment under the dram shop act, for the sale of intoxicating liquor contrary to law, containing several counts, it has been repeatedly held by our courts that the verdict should specify the counts upon which the accused was found guilty, and that judgment should be entered separately upon each of the same." In People v. Whitson, 74 Ill. 20, the court said on page 26: "It is a rule founded in good sense, that where there are numerous counts in the indictment, and the jury find the defendant guilty of the charges, and not guilty of others, it is

The people of the State of Illinois,

Defendant in Error,

vs. Error to County Court

Charles Kirchenbuhl, of Lee

Plaintiff in Error.

Mr. Justice Dunn:

The plaintiff in error, Charles Kirchenbuhl, was found guilty in the county court of Lee county on three counts of an information charging him with a violation of the prohibition law, and was sentenced to pay a fine of $500.00 and costs and be confined in the county jail for sixty days. To review that judgment a writ of error has been prosecuted from this court.

The information contained four counts. The first and second counts were identical and charged the defendant with unlawfully and knowingly selling intoxicating liquor. The third count charged the unlawful manufacture of intoxicating liquor. The fourth count charged the unlawful manufacture of intoxicating liquor. The verdict of the jury was as follows: "We, the jury, find the defendant guilty as charged in the three counts of the information." The court sentenced the defendant upon the first, third and fourth counts. It is the contention of the plaintiff in error that the verdict is so defective that it will not sustain the judgment. In Chicago and Alton Railroad Co. v. The People, 8 Ill. App. 678, on page 688, the court said: "In the case of an indictment under the dram shop act, for the sale of intoxicating liquor contrary to law, containing several counts, it has been repeatedly held by our courts that the verdict should specify the counts upon which the accused was found guilty, and that judgment should be entered separately upon each of the same." In People v. Whiteon, 74 Ill. 20, the court said on page 26: "It is a rule founded in good sense, that where there are numerous counts in the indictment, and the jury find the defendant guilty of the charges, and not guilty of others, it is

necessary that they should point out with certainty upon which charges they find guilt and of what they acquit, and it would be error to sentence the prisoner upon counts other than those upon which he is found guilty." In Day v. People, 76 Ill. 380, it was said: "This was an indictment containing twenty counts. The verdict was 'We, the jury, find the defendant guilty on ten counts', on which the court rendered consecutive judgments. This was error. The verdict should have specified the counts upon which they found the defendant guilty. * * It was impossible to know, from the verdict, on which counts the jury found the defendant guilty, and on which counts they found him not guilty." Thses rules are applicable to this case. It is contended by the defendant in error that as the first two counts were for the sale of intoxicating liquor, and as the jury found him guilty on three counts, they necessarily found him guilty of all three violations of the law, namely, selling, manufacturing and having intoxicating liquor. This does not necessarily follow. It might be just as reasonable to suppose that the jury intended to find him guilty on two counts for selling and one count for manufacturing, or on two counts for selling and one count for having intoxicating liquor, or on one count for selling, one for having and one for manufacturing. We do not think the verdict was sufficient to sustain the judgment and for that reason the judgment will have to be rewersed.

The evidence shows that prior to the filing of the information, the board of supervisors of Lee county, by resolution, authorized the state's attorney to employ detectives to investigate violations of the prohibition law in that county. The state's attorney availed himself of that right and employed detectives. The information against the plaintiff in error was founded upon charges preferred by one of these detectives. On the trial counsel for plaintiff in error called the state's attorney as a witness. The state's attorney wanted to know what he was expected to testify about, and was informed that counsel desired to ask him with reference to his authority for the employment of the detectives, whereupon the state's

[illegible] unnecessarily that they should [illegible] and with contributory [illegible] upon which charges they find guilt and of what they acquit, and it would be error to sentence the prisoner upon counts other than those upon which he is found guilty.' In Ex p. [illegible], 76 Ala. 380, it was said: "This was an indictment containing twenty counts. The verdict was 'We, the jury, find the defendant guilty on the counts', or words to that same effect [illegible]. This was error. The verdict should have specified the counts on which they found the defendant guilty. * * It was impossible to know, from the verdict, on which counts the jury found the defendant guilty, and on which counts they found him not guilty. [illegible] This case is unlike in this case. It is governed by the statement in error that as the jury found him guilty on three counts, they necessarily found him guilty of all three violations of the law, namely, selling, manufacturing and having intoxicating liquor. This does not necessarily follow. It might be that in [illegible] it appears that the jury intended to find him guilty on two counts for selling and one count for manufacturing, or on two counts for selling and one count for having intoxicating liquor, or on one count for selling, one for having and one for manufacturing. We do not think the [illegible] was sufficient to sustain the judgment and for that reason the judgment will have to be reversed.

The [illegible] the board of commissioners of the [illegible], [illegible] the state's attorney in making allowance [illegible] of the prohibition law in that county. The state's attorney [illegible] of that right and employed detectives. The information against the plaintiff in error was founded upon charges preferred by one of these detectives. In the trial counsel for plaintiff in error moved the state's attorney as a witness. The state's attorney [illegible] to know what he was employed by [illegible] [illegible] that counsel desired to ask him questions to [illegible] the trial result of the detectives, [illegible]

attorney refused to be sworn. Plaintiff in error appealed to the court but the court refused to require the state's attorney to be sworn. We think this was erroneous. The state's attorney was not exempt from testifying as a witness provided counsel for plaintiff in error desired to call him. He had no right to refuse to be sworn and it was error in the court not to compel him to be sworn. However, we do not think there was any injury to the plaintiff in error for the reason that the record of the board of supervisors authorizing the employment of detectives was subsequently offered in evidence and read in full to the jury. There may have been some other points, however, upon which counsel desired to interrogate the state's attorney and he had a right to put the state's attorney on the stand and question him.

Complaint is made of the twelfth, thirteenth, fourteenth and fifteenth instructions offered on behalf of the defendant in error. It is claimed that these instructions are erroneous for the reason that they ignore the defense sought to be established by the plaintiff in error. We have examined these instructions and are of the opinion that there was no error in giving them. They law down the rules of law applicable to the case on behalf of the defendant in error, and any omissions which there might have been in them were fully covered by instructions given on behalf of the plaintiff in error. The defendant in error insists that certain instructions offered on behalf of the plaintiff in error relative to the testimony of detectives were erroneous and should not have been given, but these instructions are not properly before this court. Most all of the instructions relative to detectives are erroneous and should not be given on another hearing.

The most serious question is the contention of plaintiff in error that the detective employed by the state's attorney induced or persuaded the plaintiff in error to manufacture the liquor in question upon the promise that the detective would sell the liquor for the plaintiff in error. In view of the fact that this judgment

attorney refused to be sworn. Plaintiff in error appealed to the court but the court refused to require the state's attorney to be sworn. We think this was erroneous. The state's attorney was not exempt from testifying as a witness provided course [illegible] in error desired to call him. He had no right to refuse to be sworn and it was error in the court not to compel him to be sworn. However, we do not think there was any injury to the plaintiff in error for the reason that the record of the board of supervisors authorizing the employment of detectives was subsequently admitted in evidence and read in full to the jury. There may have been some other points, however, upon which counsel desired to interrogate the state's attorney and he had a right to put the state's attorney on the stand and question him.

Complaint is made of the twelfth, thirteenth, fourteenth and fifteenth instructions offered on behalf of the defendant in error. It is claimed that these instructions are erroneous for the reason that they ignore the defense sought to be established by the plaintiff in error. We have examined these instructions and are of the opinion that there was no error in giving them. They lay down the rules of law applicable to the case on behalf of the defendant in error, and any omissions which there might have been in them were fully covered by instructions given on behalf of the plaintiff in error. The defendant in error insists that certain instructions offered on behalf of the plaintiff in error relative to the testimony of detectives were erroneous and should not have been given, but these instructions are not properly before this court. Most all of the instructions relative to detectives are erroneous and should not be given on another hearing.

The most serious question is the contention of plaintiff in error that the detective employed by the state's attorney induced or persuaded the plaintiff in error to manufacture the liquor in question upon the promise that the detective would sell the liquor for the plaintiff in error. In view of the fact that this judgment

must be reversed for other reasons, we have purposely refrained from any consideration of that question.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

R, H denied Nov. 23

7138

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7138

Charles D. Bemis,

appellee,

vs.

Edward E. Keating,

appellant

Appeal from County Court

of Kane

Partlow, J.

This appellee, Charles D. Bemis, began an action of assumpsit in the county court of Kane county against the appellant Edward E. Keating, to recover a real estate commission for services performed in the exchange of property between appellant and C. T. Kinney. The declaration contained the common counts, and a bill of particulars was filed. There was a trial by jury, a verdict for $750.00 and from ~~xxxx~~ the judgment entered upon the verdict this appeal was prosecuted.

The appellant contends that appellee failed to prove any contract of employment either express or implied, and for that reason appellant's motion for a directed verdict should have been allowed; also that the verdict is contrary to the evidence, and the motion for a new trial should have been granted. The evidence shows that appellee was a real estate agent living in Aurora, Kane County, and the appellant was a dealer in horses, cattle and land, living at Huntley, McHenry county. In July, 1917, appellee learned that C. T. Kinney, who resided in Aurora, had some horses for sale; that he owned a flat building in Brookline, near Boston, and wanted to trade the horses and the building for a farm. Appellee told appellant that Kinney wanted to trade for a farm, and he took appellant to see Kinney. Later appellee and Kinney went to Huntley, and appellant showed them two farms which he owned in McHenry county. Kinney was interested in the Lucas farm, and after looking at it, the three men returned to Huntley. Appellant testified that, after arriving at Huntley, he had a conversation with appellee, out of the presence of Kinney, in which appellant told appellee he did not like the

Title

Charles D. Bemis,

appellee,

vs.

Edward E. Keating,

appellant

Appeal from County Court

of Kane

Martin, J.

This appellee, Charles D. Bemis, began an action of assumpsit in the county court of Kane county against the appellant Edward E. Keating, to recover a real estate commission for services performed in the exchange of property between appellant and O. T. Kinney. The declaration contained the common counts, and a bill of particulars was filed. There was a trial by jury, a verdict for $750.00 and from the judgment entered upon the verdict this appeal was prosecuted.

The appellant contends that appellee failed to prove any contract of employment either express or implied, and for that reason appellant's motion for a directed verdict should have been allowed; also that the verdict is contrary to the evidence, and the motion for a new trial should have been granted. The evidence shows that appellee was a real estate agent living in Aurora, Kane County, and the appellant was a dealer in horses, cattle and land, living at Huntley, McHenry county. In July, 1917, appellee learned that O. T. Kinney, who resided in Aurora, had some horses for sale; that he owned a flat building in Brookline, near Boston, and wanted to trade the horses and the building for a farm. Appellee told appellant that Kinney wanted to trade for a farm, and he took appellant to see Kinney. Later appellee and Kinney went to Huntley, and appellant showed them two farms which he owned in McHenry county. Kinney was interested in the Lucas farm, and after looking at it, the three men returned to Huntley. Appellant testified that, after arriving at Huntley, he had a conversation with appellee, out of the presence of Kinney, in which appellant told appellee he did not like the

deal very well, and appellee told appellant he thought the flat property would be good property for appellant to own. Appellant testified he then told appellee he would deal with Kinney provided appellee was not to receive a commission from appellant, but this is denied by the appellee. A few days later appellant and G. R. Beverly, an attorney, drove to Aurora and met appellee about noon, near one of the banks. The deal with Kinney was discussed, and appellant testified he told appellee he was not much interested in the trade, and appellee urged him to make the deal. Appellant also testified that he there told appellee he would not make the trade if he had to pay appellee a commission, but if appellee was taken case of some other way, he would deal with Kinney. This is denied by appellee. Appellant and Beverly then went to a restaurant for dinner. Appellee called Kinney on the phone and told him appellant was at the restaurant. Kinney went to the restaurant, had a talk with appellant, and they then went to Kinney's office where the terms of the trade were agreed upon. The Lucas farm of 160 acres was figured at $187.50 an acre, or $30,000.00. Kinney's horses and flat building were figured at $25,500.00, and notes and mortgages were to be executed by Kinney to appellant for $4,500.00. The trade was completed within the next few days and deeds were exchanged. Appellant testified he had several deals with appellee from 1912 to 1917, and in every instance the commission was agreed upon before the deal was consummated and was in a lump sum; that he raised the question of commission with appellee because he wanted a definite understanding, that he had always had a definite agreement in regard to commissions, and would not make this deal if he had to pay any commission.

Appellee testified that in 1912, appellant wrote him a letter, which he could not find at the time of the trial, in which appellant agreed to allow him two and one-half per cent commission on any trades he brought to appellant at that time, but this is denied by appellant. Appellee also testified that, after the papers were signed in this transaction, he met appellant and Beverly in Aurora, and

deal very well, and appellee told appellant he thought the Kimney property would be good property for appellant to own. Appellant testified he then told appellee he would deal with Kimney provided appellee was not to receive a commission from appellant, but this is denied by the appellee. A few days later appellant and C. H. Tweedy, an attorney, drove to Aurora and met appellee about noon, near one of the banks. The deal with Kimney was discussed, and appellant testified he told appellee he was not much interested in the trade, and appellee urged him to make the deal. Appellant also testified that he there told appellee he would not make the trade if he was to pay appellee a commission, but if appellee was taken care of some other way, he would deal with Kimney. This is denied by appellee. Appellant and Beverly then went to a restaurant for dinner. Appellee called Kimney on the phone and told him appellant was at the restaurant. Kimney went to the restaurant, had a talk with appellant, and they then went to Kimney's office where the terms of the trade were agreed upon. The Lucas farm of 160 acres was financed at $127.50 an acre, or $20,000.00. Kimney's horses and flat building were figured at $25,500.00, and notes and mortgages were to be assumed by Kimney to appellant for $4,500.00. The trade was completed within the next few days and deeds were exchanged. Appellant testified he had several deals with appellee from 1918 to 1917, and in every instance the commission was agreed upon before the deal was consummated and was in a lump sum; that he raised the question of commission with appellee because he wanted a definite understanding, that he had always had a definite agreement in regard to commissions, and would not make this deal if he had to pay any commission.

Appellee testified that in 1918, appellant wrote him a letter, which he could not find at the time of the trial, in which appellant agreed to allow him two and one-half per cent commissions on any trades he brought to appellant at that time, but this is denied by appellant. Appellee also testified that, after the papers were signed

appellant offered to pay him $500.00 commission, but he told appellant he thought he ought to have the regular commission. This conversation was denied by appellant and Beverly, who testified they did not meet appellee after the meeting in front of the bank at noon. Appellee testified that several months after the deal, he saw appellant in Huntley and asked him for a commission, and appellant told him he did not think he owed him anything; that he wrote a letter to appellant asking for a settlement, but this is denied by appellant, who testified that the meeting at Huntley was about ten days after the deal was completed.

The contention of appellant is that appellee's right to recover is based solely upon an alleged express contract of employment and the evidence does not sustain such a claim; that the 1913 agreement would not be sufficient to sustain a claim for commission for an exchange made in 1917; that there never was a listing of this particular property with appellee; that appellee was a mere volunteer in this exchange and that he represented Kinney.

The law governing real estate agents' commissions is well settled in this state. The real estate agent must prove a contract of employment, either express or implied, before he can recover. Hafner v. Herron, 165 Ill. 243; Jackson v. Kohler, 289 Ill. 444; Bunn v. Smith, 190 Ill. App. 530; Turek v. Opava, 193 Ill. App. 270. If the employment of the broker is established and it appears that he was the procuring cause of the trade, he is entitled to his commission. Hersher v. Wells, 103 Ill. App. 418; McKeys v. Fster 157 Ill. App. 168. A verdict of a jury on these questions of fact will not be set aside unless it is clearly and manifestly against the weight of the evidence. Mayer v. McCann, 136 Ill. App. 501.

The appellee's claim is based upon the letter of 1913. Appellant contends that this letter, by its terms, limited the dealings to about the year 1913, but the fact is undisputed that between 1913 and 1917, the appellee made numerous deals for appellant and in every instance he received a commission. Appellant testified that

appellant offered to pay him $800.00 commission, but he told appellant he thought it was too high for such a commission. This conversation was denied by appellant and Dorothy, who testified they did not meet appellee after the meeting in front of the bank at noon. Appellee testified that several months after the deal, he saw appellant in Hamilton and asked him for a commission, and appellant told him he did not think he owed him anything; that he wrote a letter to appellant asking for a settlement, but this is denied by appellant, who testified that the meeting at Hamilton was about ten days after the deal was completed.

The contention of appellant is that appellee's right to recover is based solely upon an alleged express contract of employment and the evidence does not sustain such a claim; that the IRIS agreement would not be sufficient to sustain a claim for commission for an exchange made in 1917; that there never was a listing of this property with appellee; that appellee was a mere volunteer in this exchange and that he procured Kinney.

The law governing real estate agents' commissions is well settled in this state. The real estate agent must prove a contract of employment, either express or implied, before he can recover. Kalmer v. Harper, 108 Ill. 443; Gardner v. Ziegler, 186 Ill. 481; Shum v. Smith, 187 Ill. 490; Gray v. Ewert, 198 Ill. 477. If the employment of the broker is established and it appears that he was the procuring cause of the trade, he is entitled to his commission. Herscher v. Wells, 108 Ill. App. 418; McKeys v. Yates 187 Ill. App. 188. A verdict of a jury on these questions of fact will not be set aside unless it is clearly and manifestly against the weight of the evidence. Meyer v. McCann, 180 Ill. App. 501.

The appellee's claim is based upon the lease of 1912. Appellant contends that this letter, by its terms, limited the dealings to about the year 1912, but the fact is undisputed that between 1912 and 1917, the appellee made numerous deals for appellant and in every instance he received a commission. Appellant testified that

in each of these transactions a lump sum was agreed upon before the deal was completed, and that none of them was on a percentage basis, as specified in the letter of 1912. He also claims that he told appellee in Aurora, on the day the trade was made, that he was not much interested in it and would not make it if he had to pay appellee a commission. It seems hardly reasonable that appellant "was not much interested in the deal at that time", when he had gone to the city of Aurora for the purpose of closing the trade, and did complete it within a few hours after the alleged remark was made. Even if appellant did say he would not complete the sale if he had to pay appellee a commission, and afterwards he did complete the sale, it would not deprive appellee of his commission provided appellee established, by the evidence, a contract of employment with the appellant. Purgett v. Weinrank, 219 Ill. App. 28. We think the evidence shows that appellee was the procuring cause of this trade. He brought the parties together and was active in the transaction from beginning to end. Whether he had a contract of employment was a question of fact for the jury. The letter testified to by appellee, the subsequent deals from 1912 to 1917, engineered by him for which he was paid by appellant, and his activity in the trade in controversy, were sufficient to justify the jury in returning a verdict in favor of the appellee, provided they believed appellee's testimony. From this evidence we cannot say the judgment is so clearly and manifestly against the weight of the evidence as to justify a reversal, but on the contrary we think the evidence sustains the contention of the appellee.

Appellant objected to the admission of the letter of 1912 on the ground that there was nothing to connect it with the transaction of 1917. Sufficient foundation was laid to permit appellee to testify to the contents of this letter. He testified the letter was received by him; that it had been lost or destroyed and was not within his power to produce. When appellant objected that there was no connection between the letter of 1912 and the trade in question,

in each of these transactions a lump sum was agreed upon before the deal was completed, and that none of them was on a percentage basis, as specified in the letter of 1912. He also claims that he told appellee in Aurora, on the day the trade was made, that he was not much interested in it and would not make it if he had to pay appellee a commission. It seems hardly reasonable that appellant "was not much interested in the deal at that time", when he had gone to the city of Aurora for the purpose of closing the trade, and did complete it within a few hours after the alleged remark was made. Even if appellant did say he would not complete the sale if he had to pay appellee a commission, and afterwards he did complete the sale, it would not deprive appellee of his commission provided appellee established, by the evidence, a contract of employment with the appellant. Pugsett v. Weinrank, 212 Ill. App. 82. We think the evidence shows that appellee was the procuring cause of this trade. He brought the parties together and was active in the transaction from beginning to end. Whether he had a contract of employment was a question of fact for the jury. The letter testified to by appellee, the subsequent deals from 1912 to 1917, engineered by him for which he was paid by appellant, and his activity in the trade in controversy, were sufficient to justify the jury in returning a verdict in favor of the appellee, provided they believed appellee's testimony. From this evidence we cannot say the judgment is so clearly and manifestly against the weight of the evidence as to justify a reversal, but on the contrary we think the evidence sustains the contention of the appellee.

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counsel for appellee agreed to prove the connection between them. At the close of appellee's evidence, appellant made a motion to strike out all evidence with reference to this letter on the ground that the promised connection had not been made. The court refused to strike out the letter and this ruling is assigned as error. We think the letter, as admitted in evidence, the subsequent transactions between the parties from 1912 to 1917, taken in connection with the trade in controversy, were sufficient to justify the trial court in admitting the letter, and it then became a question of fact for the jury to say whether or not the contents of this letter, and the other evidence in the case, constituted a continuing contract between appellee and appellant and justified the recovery of the commission.

Complaint is made of the second and third instructions given on behalf of the appellee. The objection to each is that they direct a verdict and entirely ignore the appellant's defense. These instructions did not ignore the evidence offered on behalf of the appellant, but they required the jury to find from the preponderance of the evidence that an agreement had been entered into between the parties whereby the appellee was to perform certain services for the appellant, and they contained the necessary elements to be found by the jury before there could be a verdict in favor of the appellee. On behalf of the appellant the court gave four instructions which fully covered the law applicable to the appellant's defense. The jury was fully informed as to all the issues that were raised by the evidence. The instructions, taken as a series, were correct and no error was committed in any of them.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

counsel for appellee moved to prove the same other matters here.

At the close of appellee's evidence, appellant made a motion to strike out all evidence with reference to this letter on the ground that the promised connection had not been made. The court refused to strike out the letter and this ruling is assigned as error.

We think the letter, as admitted in evidence, the subsequent transactions between the parties from 1912 to 1917, taken in connection with the trade in controversy, were sufficient to justify the trial court in admitting the letter, and it then became a question of fact for the jury to say whether or not the contents of this letter, and the other evidence in the case, constituted a continuing contract between appellee and appellant and justified the recovery of the commission.

Complaint is made of the second and third instructions given on behalf of the appellee. The objection to each is that they direct a verdict and entirely ignore the appellant's defense. These instructions did not ignore the evidence offered on behalf of the appellant, but they required the jury to find from the preponderance of the evidence that an agreement had been entered into between the parties whereby the appellee was to perform certain services for the appellant, and they contained the necessary elements to be found by the jury before there could be a verdict in favor of the appellee. On behalf of the appellant the court gave four instructions which fully covered the law applicable to the appellant's defense. The jury was fully informed as to all the issues that were raised by the evidence. The instructions, taken as a series, were correct and no error was committed in any of them.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Apr, in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

M. C. Chalfant,

appellee,

vs. Appeal from Livingston

T. B. Bennett & Company,
a corporation,

appellant,

Partlow, J.

Appellee, M. C. Chalfant, began an action of assumpsit in the circuit court of Livingston county against the appellant, T. B. Bennett & Co., a corporation, to recover $2500.00, for commissions and compensation claimed to be due appellee under a written contract with appellant, wherein appellant appointed appellee as a sub-agent in the state of Ohio to sell a device known as an Economy devise, which vaporizes kerosene so it can be used in automobiles instead of gasoline. Upon issues being joined, there was a trial by jury, verdict for appellee for the full amount, and from the judgment rendered upon the verdict this appeal was prosecuted.

The first ground of reversal urged is that the court erred in not sustaining appellant's motion, at the close of appellee's evidence, to instruct the jury to find the issues for the appellant, and in denying said motion when renewed at the close of all the evidence. The evidence shows that the appellant is a corporation engaged in the hardware business in the village of Flanagan. The appellee was a salesman of Fort Wayne, Indiana. Early in 1917, appellant, through T. B. Bennett, its president, purchased from the Economy Device Company of Peoria, Illinois, the right to act as distributor for its economy device in part of Illinois and in Indiana and Ohio. The appellant, on March 28, 1917, entered into a written contract with appellee, which provided that appellee was appointed agent of appellant for the purpose of appointing local agents in the state of Ohio. The agency was to run from March 28, 1917, to December 31, 1917. Appellant was to pay appellee one dollar for each device sold by any agent which appellee might

[1.]

M. O. Oberlient,

appellee,

vs. Appeal from Livingston

T. B. Bennett & Company,
a corporation,

appellant.

Fertlow, J.

Appellee, M. O. Oberlient, began an action of assumpsit in the circuit court of Livingston county against the appellant, T. B. Bennett & Co., a corporation, to recover $2300.00, for commissions and compensation claimed to be due appellee under a written contract with appellant, wherein appellant appointed appellee as a sub-agent in the state of Ohio to sell a device known as an Economy device, which vaporizes kerosene so it can be used in automobiles instead of gasoline. Upon issues [illegible], there was a verdict for appellee for the full amount, and from the judgment rendered upon the verdict this appeal was prosecuted.

The first ground of reversal urged is that the court erred in not sustaining appellant's motion, at the close of appellee's evidence, to instruct the jury to find the issues for the appellant, and in denying said motion when renewed at the close of all the evidence. The evidence shows that the appellant is a corporation engaged in the hardware business in the village of Pierceton. The appellee was a salesman of Fort Wayne, Indiana. Early in 1917, appellant, through T. B. Bennett, its president, purchased from the Economy Device Company of Peoria, Illinois, the right to act as distributor for its economy device in part of Illinois and in Indiana and Ohio. The appellant, on June 2, 1917, entered into a written contract with appellee, which provided that appellee was appointed agent of appellant for the purpose of appointing local agents in the state of Ohio. The agency was to run from March 28, 1917, to December 31, 1917. Appellant was to pay appellee one dollar for each device sold by any agent which appellee might

appoint, and appellee was to have the exclusive right to appoint agents in the state of Ohio. A deposit was to be made by each agent, and the money so deposited was to be placed to the credit of appellee to the amount of one dollar for each device sold. The appellee was also to receive one dollar for each device ordered by an agent in repeated, or subsequent orders.

After the execution of the contract, the appellee devoted his entire time to the development of the business. He employed a mechanic and went from place to place in Ohio giving demonstrations and secured agents. Within three weeks he secured eight agents who deposited with the appellee $880.00, being two dollars for each device sold. Each of these agents' contracts provided that they were to pay $16.00 for each device, by sight draft attached at the time of the delivery. Appellee appointed L. C. Ritter, of Belle Center, Ohio, as a sub-agent for Logan and Hardin Counties, and Ritter deposited two dollars each for one hundred devices purchased by him.

On April 14, 1917, Bennett called upon Ritter at Belle Center, Ohio, and entered into a written contract with him, which contract is the basis of this suit. Bennett contends that appellant had no contract with the Economy Device Company, of Peoria, for the State of Michigan, and that Ritter wanted Bennett to appoint him distributor for the State of Michigan. He and Ritter made a written contract for the State of Michigan on a printed form used for the sale of Tracfords, but with the understanding that if Bennett could not secure the State of Michigan, the contract was to be void. Bennett could not get the State of Michigan and thereupon Ritter asked him for the State of Ohio. Bennett had paid the Peoria Company $2500.00 for the State of Ohio, and agreed to let Ritter have Ohio for that sum. Bennett testified that they struck out of the contract already executed, the word 'Michigan' and substituted the work 'Ohio', making it a contract for the state of Ohio instead of the State of Michigan.

agents, and appellee was to have the exclusive right to appoint agents in the state of Ohio. A deposit was to be made by each agent, and the money so deposited was to be placed to the credit of appellee to the amount of one dollar for each device sold. The appellee was also to receive one dollar for each device ordered by an agent he appointed, [illegible].

After the execution of the contract, the appellee devoted his entire time to the development of the business. He employed a salesman and went from place to place in Ohio giving demonstrations and secured agents. Within three weeks he secured eight agents who appointed [illegible], [illegible] sold. Some of these agents' [illegible] [illegible] at the time of the delivery. Appellee appointed L. A. Ritter, of Belle Center, Ohio, as a sub-agent for Logan and Hardin Counties, and Ritter [illegible] by him.

On April 14, 1917, Bennett [illegible] Ohio, and entered into a written contract with him, which contract is the basis of this suit. Bennett contends that appellant had no contract with the Economy Device Company, of [illegible], for the State of Michigan, and that Ritter wanted Bennett to appoint him distributor for the State of Michigan. He did [illegible] a written contract for the State of Michigan on a printed form used for the sale of [illegible], but with the understanding that if Ritter could not secure the State of Michigan, the contract was to be void. Bennett could not get the State of Michigan and [illegible] in Ohio. Bennett did sell [illegible], for the State of Ohio, and agreed to let Ritter have Ohio for that one. Bennett testified that they struck out of the [illegible], the word "Michigan" and substituted the word "Ohio", making it a contract for the state of Ohio instead of the State of Michigan.

Appellee contends that the contract entered into between Bennett and Ritter was on the same kind of a form furnished by the appellant to the appellee for the use of the agents appointed by appellee when they were ordering the devices from the appellant company; that it was entitled as a dealers agreement, and provided that Ritter was to have the right to sell the devices in the state of Ohio, from April 14, 1917, to December 31, 1917. It provided that Ritter was desirous of purchasing from the appellant large quantities of devices for resale in the State of Ohio, and that he purchased twenty-five hundred of them for which he agreed to pay $16.00 each, one dollar of such purchase price to be paid upon the signing of the contract, the balance cash on delivery. The contract shows, and it is not disputed, that at the time it was signed, Ritter paid to appellant $2500.00, $1500.00 of which was in cash, and $1000.00 by a note with Ritter's father as security. Appellee claims that he was not advised of this transaction until some time after it occurred. On June 11, 1917, he caused a sight draft to be drawn upon the appellant for $2500.00, being one dollar each for the 2500 devices sold by appellant to Ritter, which draft was returned with the endorsement "claim they do not owe this amount", and that thereupon he brought suit.

The question for determination is whether the contract entered into between appellant and Ritter was a sale of twenty-five hundred devices, as claimed by appellee, or whether it was intended that this contract was to be a transfer of the right of the appellant to sell devices in the State of Ohio; and that under it Ritter assumed the obligation of the appellant to the appellee thereby relieving the appellant from any further obligation to the appellee.

The trial court permitted Bennett to testify concerning this transaction, and allowed him to vary the terms of the written contract between appellant and Ritter by parole evidence, this being a litigation which was not between theoriginal parties to the contract; and also permitted him to testify concerning conversation which he had with Ritter out of the presence of the appellee.

Appellee contends that the contract entered into between Bennett and Hitter was on the same kind of a form furnished by the appellant to the appellee for the use of the agents appointed by appellee [illegible] in [illegible] company; that it was entitled as a dealers agreement, and provided that Hitter was to have the right to sell the devices in the state of Ohio, from April 1st, 1917, to December 31, 1917. It provided that Hitter was desirous of purchasing from the appellant large quantities of devices for resale in the state of Ohio, and that he purchased twenty-five hundred of them for which he agreed to pay $16.00 each, one dollar of each purchase price to be paid upon the signing of the contract, the balance cash on delivery. The contract shows, and it is not disputed, that at the time it was signed, Hitter paid to appellant $2500.00, $1500.00 of which was in cash, and $1000.00 by a note with Hitter's father as security. Appellee claims that he was not advised of this arrangement until some time after it occurred. On June 11, 1917, he issued a sight draft to be drawn upon the appellant for $8500.00, being a dollar each for the 8500 devices sold by appellant to Hitter, which draft was returned with the endorsement "claim they do not owe this amount", and that thereupon he brought suit.

The question for determination is whether the contract entered into between appellant and Hitter was a sale of twenty-five hundred devices, as claimed by appellee, or whether it was intended that this contract was to be a transfer of the right of the appellant to sell devices in the State of Ohio: and that under it Hitter assumed the obligation of the appellant to the appellee thereby relieving the appellant from any further obligation to the appellee.

The trial court permitted [illegible] to vary the terms of the written contract between appellant and Hitter by parole evidence, this being a litigation which was not between the original parties to the contract; and also permitted him to testify concerning conversation which he had with Hitter out of the presence of the appellee.

We have carefully examined both of the contracts in controversy. The contract between the appellee and the appellant was a contract in which the appellee was appointed as the sole representative of the appellant in the State of Ohio to appoint sub-agents for the sale of the devices, and provided compensation for the appellee. It was to run from March 28, 1917, to December 31, 1917. The contract between the appellant and Ritter designated appellant as the distributor and Ritter as the dealer. It provided that, in consideration of the dealers agreement to purchase from the distributor a number of devices thereinafter designated, and as many more as the trade in his territory required, the distributor selected the dealer as his customer in said territory. It further provided that the dealer "hereby purchases 2500 devices, and agrees to pay for the same as herein provided, the same to be shipped to him when ordered during the year 1917"; that the dealer agrees to pay "the sum of $16.00 for each"; that the dealer was in no way the legal representative, or agent, of the distributor and had no right, or authority, to assume any obligation on behalf of the distributor; that it was mutually agreed that all devices thereafter ordered, during the life of the contract, should be deemed purchases and shipped subject to the same terms and conditions as those then ordered. It was further agreed that the contract contained the full and entire contract between the parties, and no alterations should be valid unless in writing and signed by both parties.

Under this contract between appellant and Ritter, Ritter purchased twenty-five hundred of these devices. He purchased them at the time when appellee had the exclusive right to appoint agents and receive the commission of one dollar each. The oral explanation of Bennett does not change the legal effect of this instrument. In fact, we think the evidence of Ritter tends to show that the language of the contract was used advisedly and expressed the true intention of the parties. Clause 15 of the contract provided that the agreement contained the full and entire contract between the parties, and no alteration should be valid unless in writing and

We have carefully examined both of the contracts in controversy. The contract between the appellee and the appellant was a contract in which the appellee [illegible] the exclusive right to sell the devices in the territory [illegible] the sale of the devices, and provided compensation for the appellee. It was to run from March 20, 1917, to December 31, 1917. The contract between the appellee and the appellant [illegible] as the distributor of [illegible] devices. It contained [illegible] in consideration of the dealers agreement to purchase from the distributor a number of devices [illegible], and to [illegible] more as the trade in his territory required, the distributor [illegible] the dealer as his customer in said territory. It further provided that the dealer "hereby guarantees 5000 devices, and agrees to pay for the same as herein provided, the same to be shipped on his then ordered during the year 1917"; that the dealer agrees to pay "the sum of $10.00 for each"; that the dealer has no exclusive legal representative, or agent, or the distributor has not no right, or authority, to make any [illegible] or [illegible] the distributor; that it and [illegible] agrees [illegible] to [illegible] [illegible]; during the life of the contract, should be deemed [illegible] and valued subject to the same terms and conditions as those herein [illegible]. It was further agreed that the contract contained the full and entire contract between the parties, and no alterations should be valid unless in writing and signed by both parties.

[illegible]

[illegible] at the time when appellee had the exclusive right to appoint agents to receive the commission of one dollar each. The oral [illegible] [illegible]

In fact, we think the evidence of witnesses tends to show that the language of the contract had been carefully and [illegible] the terms in section of the parties. Clause 13 of the contract provided that the [illegible] [illegible] [illegible] [illegible] [illegible]

signed by both parties. Bennett's evidence, which tended to change the terms of the written instrument, in effect caused a conflict in the evidence, and it was the duty of the jury to determine this disputed question of fact. We will not disturb the finding of the jury unless it is clearly against the weight of the evidence. We think the evidence shows that the contract entered into between the appellant and Ritter was, in fact, a sale of twenty-five hundred devices, and that appellee was entitled to his commission of one dollar each.

Appellee's first instruction told the jury what elements to consider in order to determine upon which side was the weight or preponderance of the evidence, but it did not, by express terms, mention the number of witnesses as one of those elements. In support of its contention that this instruction is erroneous, appellant cites the case of Chicago Union Traction Company v. Hampe, 228 Ill. 346. The first instruction is not identical with the one in the Hampe case. In that case, the instruction enumerates several elements to be taken into consideration, omitting the number of the witness, and then told the jury that from these elements named the jury should determine the weight, or preponderance of the evidence. The first instruction complained of told the jury to consider the opportunity of the several witnesses for knowing the things about which they testify and, after naming several other things to be considered, it told the jury that in view of all the other evidence, facts and circumstances in evidence, they were to determine on which side was the preponderance of the evidence. This instruction does not come within the rule announced in the Hampe case. It does not limit the elements to be taken into consideration, to a few facts and circumstances, but it directs the jury to determine the weight of the evidence from all the facts and circumstances in evidence. The instruction was nor erroneous.

Appellee's second instruction advised the jury that when parties execute a written contract, such written instrument is

signed by both parties. Counsel's evidence, which bound on
changing the terms of the written instrument, in effect caused a con-
flict in the evidence, and it was the duty of the jury to determine
this disputed question of fact. We will not disturb the finding
of the jury unless it is clearly against the weight of the evidence.
We think the evidence alone that the contract entered into between
the appellant and Ritter was, in fact, a sale of twenty-five murdered
devices, and that appellee was entitled to his commission of one
dollar each.

Appellee's first instruction told the jury that elements to
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appellant cites the case of Chicago Union Traction Company v.
Hampe, 228 Ill. 346. The first instruction is not identical with
the one in the Hampe case. In that case, the instruction enumerates
several elements to be taken into consideration, omitting the number
of the witnesses, and then said the jury should determine
upon which side was the weight, or preponderance of the
evidence. The first instruction complained of told the jury to
consider the opportunity of the several witnesses for knowing
the things about which they testify and, after naming several
other things to be considered, it told the jury that in view of
all the other evidence, facts and circumstances in evidence, they
were to determine on which side was the preponderance of the evi-
dence. This instruction does not come within the rule announced
in the Hampe case. It does not limit the elements to be taken
into consideration, to a few facts and circumstances, but in direct
the jury to determine the weight of the evidence from all the facts
and circumstances in evidence. The instruction was not erroneous.

Appellee's second instruction advised the jury that when
parties execute a written contract, such written instrument is

presumed to contain all of the terms of the contract between the parties, and when the contrary is claimed, the burden of proof is upon the party to such contract who claims the same does not contain all of the terms. The objection to this instruction is that it erroneously case upon appellant the burden of establishing that the real contract between appellant and Ritter was not the contract appearing in the written instrument. The instruction as given, announces a correct rule of law and was applicable to the facts in this case as presented by the evidence on behalf of the appellee. The instructions given on behalf of the appellant cover the appellant's theory of the case and when all of the instructions are taken together as a series, they could not mislead the jury. Therefore, there was no error in the second instruction.

The sixth instruction given on behalf of the appellee is as follows: "You are further instructed that if you believe from the evidence and the instructions of the court," etc. The complaint is to the use of the words,"and the instructions of the court", it being contended that the jury only had to deal with the evidence and had nothing to do with the instructions of the court. No complaint is made of the balance of this instruction. The fair and reasonable interpretation of the language used is that if the jury believe from the evidence <u>under</u> the instructions of the court. It did not mislead the jury so they would think they had anything to do with determining the law applicable to the case, but it told them to decide the case entirely on the evidence under the law as laid down by the court.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 5th day of March in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

Term No. 17 Agenda No. 42

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MARCH TERM, A. D. 1922.

DAVID A. STAFFORD, Appellant, vs. W. B. JONES, et al., Appellees.	Appeal from Fayette Circuit Court.

OPINION BY BARRY, J.

In a bill for injunction appellant charged that appellees placed obstructions in Indian Camp Branch and changed the natural flow of the water into a ditch made by them by reason whereof a portion of his land was washed away and his land flooded to such an extent as to render it practically unfit for cultivation and that previous thereto the waters of said Branch never came upon, passed over or touched his land. The Chancellor heard the evidence, in open court, and entered a decree dismissing the bill for want of equity at appellant's costs.

Indian Camp Branch comes down from the hills and enters the Jones land from the west or northwest and flows in an easterly direction until it passes a hill on the Jones forty at a point near the middle of the tract. That such had always been its course up to that point is not disputed. There is a dispute as to original course the water took from that point. There is evidence to the effect that it there spread out on the Jones forty some of it going on east toward appellant's land and some south or southeasterly over the Jones and Flem Stafford lands in several channels which united farther down and emptied into Beck's Creek. Some 15 or 20 years ago Mr. Wilson, who then owned the Jones forty, built a levee on the north and east sides of Indian Camp Branch on his land in an effort to turn it all south and keep it from going east. As a rule there were two or three freshets every year that washed out the levee the repair of which was a matter of frequent recurrence.

The fact that the levy was built and maintained at an annual expense for many years tends strongly to show that the natural course for a large part of the water of Indian Camp Branch was in an easterly direction toward appellant's land. When in good repair the levee kept the water from going in that direction and caused it to flow southeasterly

Filed May 11th 1922
Rehearing Denied 11/1-1922

across the Jones and Flem Stafford lands. The lands of appellant are in a bottom and have always been subject to overflow in times of freshets. The soil of the Jones land is very sandy and much of it is cleared timber land. Until ten years ago no tiling had been done in that vicinity, but now there is a large amount of tiling which drains into Indian Camp Branch and Bailey Branch. This brings the water into these branches more quickly than before and creates a more rapid current than in former years.

Because of the sandy soil, Indian Camp Branch, during rainy seasons, would make new channels as old ones filled. It had done that for many years. The evidence tends to show that it had four or five different channels down through the Flem Stafford land. The levee was on the Jones land when Mr. Jones bought it. It washed out several times and he repaired it. Mr. Flem Stafford sued him for maintaining the levee because it interfered with the natural flow and caused water to go upon his land which would naturally flow east were it not for the levee. The suit was never tried because Mr. Jones agreed that if the levee washed out again he would not repair it, but allow the water to take its course.

In the spring of 1915, Mr. Jones plowed the Jones forty for corn and before it was planted there were two or three heavy rains and the levee broke. The plowed ground was loose and washed readily. After the spring rains it was found that the old channel of Indian Camp Branch was filled with sand and that it had cut a new and well defined channel to the east across the Jones land to the Bailey Branch, which runs north and south at the west line of appellant's land.

The new channel thus formed did not, at first, run straight east on the Jones land, but from near the center curved to the south for a distance of about five rods and then turned east to the Bailey Branch. The next year Mr. Jones straightened the channel by taking out the five rod curve. He placed posts and wire on the south bend of the curve and placed the soil from the excavation in the curved portion of the channel and leveled it.

Appellant attempted to prove that Mr. Jones placed obstructions in the old channel of Indian Camp Branch running south from near the center of his forty and in which the water usually flowed while the levee was maintained and that he made a ditch to the east line of his land into which the water was diverted by reason of the said obstructions.

We are of the opinion that the trial court was warranted in finding that Mr. Jones did not place any obstructions in the old channel but that the same was filled with sand caused by the action of the water on the plowed ground.

There is also evidence sufficient to warrant the finding that Mr. Jones did nothing more than to straighten the new channel by taking out the five rod curve as above stated. Where a stream changes its course the new channel does not require age to become a natural water course, 27 R. C. L. 1066; Rait vs. Furrow, 6 L. R. A. (N. S.) (Kas.) 157.

From a full and careful consideration of all the evidence we are of the opinion that the court did not err in dismissing appellant's bill for want of equity. The decree is, therefore, affirmed.

Affirmed.

Not to be reported in full.

Filed Oct. 11, 1922

Term No. 52 Agenda No. 35

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

MARCH TERM, A. D. 1922

J. F. SCHILLING, Administrator of the Estate of Elizabeth Schilling, Deceased. Appellee. vs. CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Appellant.	Appeal from the City Court of Granite City.

Opinion by BOGGS, J.

Appellee, as Administrator of the Estate of Elizabeth Schilling, deceased, recovered a judgment for $1,500.00 in the the City Court of Granite City, against appellant, C., C., C. & St. L. Railway Company, for the death of Elizabeth Schilling, who was struck by a passenger train of appellant on the Market Street crossing in the City of Venice. To reverse said judgment, appellant prosecutes this appeal.

When the suit was originally instituted the St. Louis Merchants' Bridge Terminal Ry. Company was joined with the appellant as party defendant, but before the trial the suit was dismissed as to said Terminal Railway Company.

The first count of the declaration charges general negligence on the part of appellant. The second count alleges negligence in failing to ring the bell or to blow a whistle for said crossing. The third count is based on the alleged negligence of appellant in operating its train through said city at a speed of more than ten miles an hour, in violation of the ordinance of said city. The fourth count charges negligence on the part of the watchman of appellant at said crossing in failing to warn or notify the deceased of the approach of said train. To said declaration appellant filed a plea of the general issue.

It is first contended by appellant that the Court erred in failing to direct a verdict in favor of appellant at the close of appellee's evidence, and then again at the close of all the evidence, on the gound that appellee's intestate was not in the exercise of due care for her own safety just prior to and at the time of the injury, and that appellant was not guilty of the negligence charged in said declaration or any count thereof.

Mrs. Schilling, the deceased, resided with her grandson, who lived on the west side of the crossing in question. She was employed at St. Louis and it was her custom to ride to said city on the Illinois Traction System, which runs through Granite City. In taking the car it was necessary for her to

cross Market street from a westerly to an easterly direction. There were a number of railroad tracks intersecting this public crossing, among which were those of the appellant. While the general direction of said track is northerly and southerly, yet there was a curve in its approach from the south toward the Market street crossing. Some of the witnesses described it as being a short curve while others describe it as a long one. On the day in question appellee's intestate left her home evidently for the purpose of boarding a car on the Traction Line for St. Louis. While crossing appellant's tracks one of its passenger trains coming from the south struck and killed her.

On the question as to whether or not appellant was guilty of the negligence charged in appellee's declaration, it may be said that the evidence in reference thereto was conflicting.

The testimony of the witnesses on the part of appellee is to the effect that the train was running from twenty to thirty miles an hour, while the testimony of the witnesses on the part of appellant was to the effect that the train was not running over eight or ten miles per hour. The ordinance pleaded in said cause and which was admitted in evidence, limited the operation of trains within said village to a speed not exceeding ten miles per hour. There was also a conflict in the evidence as to whether or not the watchman who was stationed by appellant at said crossing was at his station and in the performance of his duty at the time appellee's intestate approached said crossing. The evidence on the part of appellee being to the effect that he was not in the performance of his duty; that he was standing at the side of the shanty adjacent to said crossing and was picking up something at the time of the accident in question; while the evidence on the part of appellant was to the effect he was at his station and was in the performance of his duty. It was, therefore, a question for the jury as to whether or not appellant was guilty of the negligence charged.

On the question as to whether or not appellee's intestate just prior to and at the time of the injury, was in the exercise of ordinary care for her own safety, will say, that while there is no affirmative evidence to the effect that she looked and listened for the approach of a train as she crossed appellant's track, still we are of the opinion in view of the evidence in the record with reference to the speed of the train, the question as to whether or not a bell was sounded and as to whether or not the watchman maintained at said crossing was in the performance of his duty just prior to and at the time of the accident, appellee would not be required in order to prove due care, by positive testimony that she looked and listened as she approached said crossing. Counsel for appellant contend that in order for appellee to make out his case he must furnish such proof. We do not understand that to be the holdings of the Supreme and Appellate courts in this state. In Dukeman v. C., C., C. & St. L. R. R. Co. 237 Ill. 104, the court at page 107 in discussing a question of this character says: "The evidence does not show that the deceased failed to look or listen for the approach of the train, and if it did, such failure would not be negligence per se. A failure to look and listen cannot be said to be negligence as a matter of law, since there may be many circumstances excusing such failure.

(Chicago & Northwestern Railway Co. v. Hansen, 166 Ill. 623; Chicago and Alton Railroad Co. v. Pearson, 184 id. 386; Elgin, Joliet and Eastern Railway Co. v. Lawlor, 229 Id. 621.) The deceased had a right to presume that appellant would not run its train in violation of the ordinance of the city, and contributory negligence could not be imputed to her for failure to anticipate that appellant would approach this crossing at a rate of speed prohibited by the ordinance. In connection with the other circumstances surrounding the accident, the natural instinct prompting to the preservation of life and the avoidance of injury, and consequent suffering and pain, may also enter into the consideration of the jury in determining the question of the due care of the deceased. (Chicago and Eastern Illinois Railroad Co. v. Beaver, 199 Ill. 34). We are not prepared to say, as a matter of law, that the deceased was guilty of such contributory negligence as to preclude a recovery. We think this question was properly submitted to the jury as one of the fact."

We therefore hold that the Court did not err in refusing to direct a verdict on appellant's motion.

It is next contended by appellant that the court erred in giving the five instructions given on behalf of appellant. The first instruction informed the jury that in estimating appellee's damages the had a right to take into consideration the prospective life of the said Elizabeth Schilling, "her opportunity, ability and habits with reference to the making and saving money, etc."

There was no evidence offered with reference to the ability of Mrs. Schilling to make and save money, nor as to her life expectancy. The court therefrom erred in giving this instruction.

The second instruction merely defines what constituted negligence and in our judgment substantially states the law as laid down by our courts. The third instruction is erroneous for the reason that it in effect assumed that appellee's intestate was in the exercise of due care for her own safety at the time of the accident. The fourth instruction is erroneous in that it practically assumes that the flagman maintained by appellant at the crossing in question was not in the performance of his duty just prior to and at the time of the accident. It also has a tendency to lead the jury to believe that it was assumed by the court that appellee's intestate at said time was in the exercise of due care for her own safety.

Instruction number five is erroneous in that, it in effect assumes that at the time in question no bell was rung or whistle sounded on appellant's engine.

It is also contended that the court erred in refusing to give the first and second of appellant's refused instructions. We have examined said instruction and are of the opinion that in so far as they state correct principles of law they were covered by other instructions given by the court on behalf of appellant. Thirteen instructions were given at the instance of appellant and they fully presented appellant's theory of the case so far as it was based on the evidence.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

Not to be reported in full.

Handed down & filed Oct. 11th 192-

Kepp & Barter, Attys for appellant

R. W. G. Wirt et al. appellee

Ag. No. 4. Term No. 11

STATE OF ILLINOIS—APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1922

SEARS ROEBUCK & CO., Appellee, vs. O. L. BARTLETT, Apellant.	Appeal from Pulaski Circuit Court.

BARRY, J.

Appellee's declaration, in assumpsit, contains the common counts and a special count. The latter is based upon a trade acceptance signed by appellant. He filed a plea in abatement to the effect that prior to the commencement of the suit he paid appellee $550.00 in consideration of which appellee extended the time of payment of the said acceptance for one year from Oct. 21, 1921. The plea avers that the sum of money sued for in this cause was not due and payable to appellee at the time suit was brought because of the said extension. Appellee demurred to the plea and the demurrer was sustained by the Court. He then demurred to the declaration and the demurrer was overruled and declining to further plead the Court entered judgment against him for the amount of appellee's claim.

Appellant contends that his plea in abatement answers the entire declaration and that the Court erred in sustaining the demurrer thereto. If the plea had answered the entire declaration his contention would have to be sustained. We find, however that the plea avers that he paid a consideration for the extension of the trade acceptance, but does not aver that appellee's sole cause of action was upon the said acceptance. In other words while the plea purports to answer the whole declaration it only answers the special count. The extension of the time of payment of the acceptance would not extend some other cause of action for which appellee might be entitled to recover under the common counts, unless it was so agreed. The plea does not aver that there was an agreement to extend any cause of action other than that upon the acceptance.

A plea that purports to do so must answer the whole declaration. If it simply answers the special count and leaves the common counts unanswered it is bad on demurrer. Gibbie vs. Mooney, 121 Ill. 255. Having failed to aver in the plea that appellee's sole cause of action was upon the trade acceptance mentioned in the special count the demurrer was properly sustained, Haley vs. Supreme Court of Honor, 139 App., 478-487.

The general rule is, that the misnomer of a corporaton has the same effect as the misnomer of an individual, and when the true name is necessarily to be collected from the in-

strument or is shown by proper averments, a grant by deed to a corporaton or a contract with it, will not be invalidated thereby, 7 Am. & Eng. Enc. (2nd Ed.) 688; Northwestern Distilling Co. vs. Brant, 69 Ill. 658. It seems to be well recognized that a corporation, as well as individuals, may have or be known by several names in the transaction of its general business so that it may enforce, as well as be bound by, contracts entered into in an adopted name other than the regular name under which it was incorporated, 7 R. C. L. 127.

A corporation cannot, except as authorized by statute, change its name, either directly or by user, but if a corporation acts by a wrong name it will not be permitted to avail itself of its own wrong after receiving the consideration. Pilsen Brewing Co. vs. Wallace, 291 Ill. 59, and on the same principle one who deals with a corporation under an assumed name should not be permitted to avoid his liability after receiving the consideration. In Standard D. & D. Co. vs. Springfield C. M. & T. Co., 146 App. 144 at page 149, the Court said: "In the absence of injury or loss to appellants by reason of the use of the name 'Globe Distillery' instead of the 'Standard Distilling and Distributing Co.' we see no reason for releasing appellants from the force of a contract entered into by it with appellee under the former title."

In our opinion the Court properly overruled the demurrer to the declaration and the judgment should be affirmed.

Affirmed.

Not to be reported.

Ag. No. 2. Term No. 19.

STATE OF ILLINOIS—APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1922

JESSE LANDFRIED, Appellee, vs. WEBER IMPLEMENT & AUTOMOBILE CO., Appellant.	Appeal from City Court East St. Louis.

BARRY, J.

On appeal to the City Court from a Justice of the Peace appellee recovered a judgment for $207.47.

Harry Mease was in the auto business in East St. Louis and sold used cars for appellant. On July 15, 1921, Mease received a written order from appellee in which the latter ordered from appellant a certain Dodge car at the price of $550 and made a cash payment of $20.00. $180.00 to be paid on delivery and the balance in ten equal notes. The order made no reference to whether or how the notes were to be secured. The next morning appellee called at the office of Mr. Mease and paid him $180.00. The order was reported to appellant by Mr. Mease and appellant prepared notes and chattel mortgage on the basis that appellee was to pay $605.00 for the car. The difference between the price stated in the order, $550.00 and the $605.00, was to cover fire and theft insurance and brokerage.

Appellee refused to sign the notes and chattel mortgage and said he had signed all the papers he agreed to sign and asked Mease to return his $200.00. The money was not returned and he brought suit against Mease and recovered a judgment for $200.00 before a Justice of the Peace. The judgment was not paid and he later brought this suit against appellant. The undisputed evidence is that no part of the $200.00 collected by Mease was paid over to appellant.

The written order signed by appellee contains this provision: "Notice.—This order is subject to the acceptance of Weber Implement Co., who reserve the right to fill orders to the extent of their ability to do so, provided such orders are acceptable and they have the goods in stock, and shall in no wise be liable for any damages either real or supposed in this connection."

It was simply an offer on the part of appellee to purchase on the terms stated which he could withdraw before it was accepted and approved by appellant, Martin & Co. vs. Wilms, 61 App. 108. Apellant was not willing to accept the offer as made and made a counter offer on different terms by asking appellee to execute the notes and chattel mortgage. Appellee re-

fused to accept the counter offer and demanded his money back as he had a right to do.

Where a contract has been rescinded or a person has received money as agent of another, who had no right thereto and has not paid it over, an action may be maintained against the agent by the party entitled thereto, to recover the money. Smith vs. Bender, 75 Ill., 492; Shipherd vs. Underwood, 55 Ill. 475. When appellee withdrew his offer and demanded a return of his money he was entitled to and did recover a judgment against Mr. Mease.

Appellee has cited no authority and we know of none that would authorize him to recover another judgment against appellant on the same cause of action. To allow him to do so might enable him to collect, eventully, double the amount he paid. If he desired to hold appellant he should have sued it in the first instance. The judgment is reversed with a finding of facts.

Reversed with Finding of Facts.

The clerk will incorporate in the judgment the following finding of facts:

"The Court finds that appellee's offer to purchase was withdrawn before it was accepted by appellant and appellee sued the agent Mease and recovered judgment for the amount paid the said Mease before this suit was brought and the money collected by said agent has never been paid to appellant and that appellee is not entitled to recover."

Not to be reported.

Agenda No. 5. Term No. 12.

STATE OF ILLINOIS—APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1922

BANK OF POPLAR BLUFF, Appellee, vs. O. L. BARTLETT, Appellant.	Appeal from Pulaski Circuit Court

Per Curiam.

The declaration is in assumpsit and contains the common counts and a special count, the latter being upon a trade acceptance Appellant filed a plea in abatement purporting to answer the whole declaration to which a demurrer was sustained and having elected to stand by his plea the Court rendered judgment for the amount of appellee's claim.

Appellant contends that the Court erred in sustaining the demurrer to his plea. The identical question was raised by this appellant in Sears, Roebuck & Co. vs. Bartlett, and we decided adversely to his contention in an opinion filed at this term of Court. For the reasons stated therein the judgment in this case must be affirmed.

Affirmed.

Not to be reported.

Ag. No. 32. Term No. 20.

STATE OF ILLINOIS—APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922

W. P. WELKER, Appellant, vs. W. E. ALLISON, Appellee.	Appeal from Fayette Circuit Court.

Per Curiam.

Appellant brought this suit to recover the consideration paid by him for two certain participation certificates and attorneys fees. The action is brought under Section 37 of the Securities Act and the declaration avers that said certificates were sold to appellant by appellee without complying with and violation of said Act. In his declaration appellant shows that prior to the commencement of this suit he tendered the said certificates to appellee and demanded that he pay back to him the consideration paid therefor and that he is ready and does produce the said certificates in Court for the use of appellee.

Appellee filed a plea in abatement to which appellant interposed a demurrer and the same was overruled. Appellant then elected to abide by his demurrer and the Court rendered judgment in favor of appellee.

The questions raised in this case are the same as those decided in Rice vs. Allison in an opinion filed at the present term of this Court and for the reasons stated therein the judgment of the Circuit Court must be reversed and the cause remanded with directions to allow appellant's motion and to sustain the demurrer to the plea.

Reversed and Remanded with Directions.

Not to be reported.

Ag. No. 18. Term No. 46.

STATE OF ILLINOIS—APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922

F. M. EDWARDS, Appellee, vs. MARION COUNTY COAL CO., Appellant.	Appeal from Marion Circuit Court.

Per Curiam.

Appellee is a physician and was employed by appellant to care for an employe who was injured in the course of his employment. He sued to recover for his services and appellant filed a plea to the jurisdiction of the Court on the ground that it is a matter to be determined by the Industrial Commission. A demurrer was sustained thereto and appellant having elected to stand by its plea the Court entered judgment for the amount of appellee's claim.

Appellant contends that the Court erred in sustaining the demurrer to its plea. The identical question was raised and decided adversely in Edwards vs. Centralia Coal Co., in an opinion filed at the present term of this Court and for the reasons stated therein the judgment of the circuit court must be affirmed.

Affirmed.

Not to be reported.

Term No. 6. Agenda No. 37.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

THE PEOPLE OF THE STATE OF ILLINOIS, ~~Appellees,~~ vs. JOHN BARKWILL, ~~Appellant.~~	Appeal from Crawford County County Court.

Opinion by Boggs, P. J.

Plaintiffs in Error was arrested, tried and convicted in the Circuit Court of Crawford County, under the Search and Seizure Statute. The court adjudged a fine against him for $200.00 with an order of commitment until the fine and costs be paid. To reverse said judgment this writ of error is prosecuted.

The record discloses that on or about April 4, 1921, Plaintiff in Error and one O. F. Chapman, was found in an intoxicated condition on the public highway a few miles South of Robinson. The automobile in which they were riding was standing crossway of the road at the time in question. Plaintiff in Error and his companion had several bottles in their possession in said car, labeled "Jamaica Ginger" together with a bottle of water and a glass. Said parties were arrested and said bottles were taken in possession by the Sheriff and States Attorney and were offered in evidence on the trial of said cause.

It is first contended by the plaintiff in error for a reversal of said judgment that the court erred in its rulings on the evidence. The Sheriff testified that he scented and tasted the contents of said bottles, and that in his judgment they contained intoxicating liquors. Counsel for Plaintiff in Error moved to exclude said testimony on the ground that there was no showing that the Sheriff had said bottles in his possession since Plaintiff in Error's arrest. The Court overruled said motion and it is insisted said ruling was erroneous. Without going into an extended discussion of this assignment of error, it is only necessary to say that the testimony of the Sheriff that these were the bottles that were taken from the car in which Plaintiff in Error was found was proper to be admitted in evidence. If Plaintiff in Error desired to know what effort had been made to preserve said bottles, he had a right to cross examine the Sheriff in reference thereto. This he failed to do. The Court did not err in overruling said motion.

It is next contended by Plaintiff in Error that the judgment in this case cannot stand for the reason that at the time he was arresed no warrant had been sworn out for his arrest or for the seizure of the liquor that might be found in his

possession. This was not necessary as an officer always has the right to make an arrest provided he has sufficient proof to sustain a conviction of the party arrested.

Section 342 of the Criminal Code provides as follows: "An arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed or attempted in his presence or by an officer when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it."

It is next contended by Plaintiff in Error that the verdict is against the manifest weight of the evidence. The argument on this motion however was largely based on the proposition that the court should have excluded the testimony of the Sheriff as to the contents of said bottles being intoxicating. The formula contained on the label on the bottles in question were to the effect that the contents of said bottles was 90 per cent alcohol. This we think in connection with the testimony of the Sheriff that he tasted the contents of said bottles and that the contents was intoxicating, along with the fact that the Plaintiff in Error was found in an intoxicated condition at the time of his arrest was certainly sufficient to sustain said verdict.

Plaintiff in Error was found guilty on two counts of the information, namely; the third and fourth, and it is insisted by his Counsel that there could be no finding of guilty on more than one count as the evidence discloses it was all one transaction. An examination of the information will disclose that separate offenses were charged against plaintiff in error.

The third count charged Plaintiff in Error with transporting liquor in Oblong Township of said County and the fourth count with the transporting of liquor in Robinson Township in said County. We think the evidence was sufficient to sustain the verdict of guilty on both counts.

It is next insisted by Plaintiffs in Error that the Court erred in making certain remarks during the trial in the presence of the jury. The remarks complained of were not objected or excepted to at the time of the trial and can therefore not be urged as ground of reversal in a reviewing court. People vs. Lee, 248 Ill. 64; Chicago Hanson Cab Company vs. Havelick, 131 Ill. 179; Gill vs. The People, 42 Ill. 312.

It is next contended by Plaintiff in Error that the Court erred in its rulings on the instructions. We have examined the instructions complained of and are of the opinion that they are not subject to the criticism made. All the instructions complained of are what are known as stock instructions.

The third instruction was passed on and approved by the Supreme Court in the People vs. Searbook, 245 Ill. 435. The People's fourth instruction was before the Supreme Court and was approved in Watts vs. The People, 126 Ill. 9. An examination of the authorities discloses that the court did not err in its rulings on the instructions.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported.

Term No. 24. Agenda No. 19.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

LAWRENCE BIEBEL, by ERWIN BIEBEL, His Next Friend, Defendant in Error. vs. PHILIP LEHMAN, Plaintiff in Error.	Error to Circuit Court of St. Clair County.

Opinion by Boggs, P. J.

An action on the case was instituted in the Circuit Court of St. Clair County, by Defendant in Error, hereinafter called plaintiff, a minor suing by his next friend against Philip Lehman, plaintiff in error, hereinafter called defendant, for injuries to plaintiff resulting from being bitten by a dog belonging to defendant.

The declaration consists of two counts. The first count charges that the defendant did wilfully and injuriously keep a certain dog well knowing that the said dog was used and accustomed to attacking and biting mankind; that said dog on to-wit: Dec. 19, 1920, did attack and bite the plaintiff, etc. The second count is similar to the first except that in addition to the charges in the first count, it is charged that said dog was a vicious dog, and that the defendant at that time knew it was a vicious dog. To said declaration the defendant filed a plea of the general issue and a special plea denying ownership of the dog. A trial was had resulting in a verdict and judgment against the defendant for $1500.00. To reverse said judgment this writ of error is prosecuted.

The record discloses that on or about the 10th. day of December 1920 the defendant was living with his family in the village of Rentchler in St. Clair County. He was engaged as an engineer at a coal mine located approximately 500 ft. from his residence. The defendant owned or kept a dog at his home which he claimed was procured by a minor son who had since deceased. This dog was an airedale and shepherd cross and was about one year old at the time referred to. On the day in question being Sunday, the defendant left his home for the mine where he was engaged in cleaning the boiler of the engine, and two of the defendant's neighbors came to his residence for the purpose of butchering hogs for him. About 10 o'clock a man by the name of Smith with his little boy aged 5 years, came to where the men were butchering and said dog attacked the child and bit his hand. About One O'clock in the afternoon of said day the plaintiff came to the defendant's home and went out to where the men were butch-

ering. He was there attacked by said dog, knocked down and severely bitten in the calf of the leg from which injury he suffered for several weeks.

It is contended by counsel for the defendant, that as a matter of law before the plaintiff is entitled to recover it devolves upon him to prove by a preponderance of the evidence, first, that prior to the time he was bitten the dog in question was vicious and addicted to biting persons. And, second, that plaintiff knew of this fact prior to the time. That the law is as stated counsel for the defendant is not seriously controverted in this case, and is well established by the authorities. Ammon vs. Melton, 42 App. 186; Johnson vs. Eckberg, 94 App. 636; Fritsche vs. Clemow, 109 App. 355; Domm vs. Hollenbeck, 259 Ill. 382.

It is further the contention of counsel for defendant that the verdict of the jury on these two propositions is against the manifest weight of the evidence.

On the proposition as to whether prior to the time plaintiff was bitten the dog in question was vicious and addicted to biting persons, the evidence is confined to the testimony in regard to the dog having bitten the Smith boy about 10 o'clock of the day on which plaintiff was bitten. There is nothing to show that prior thereto said dog ever evidenced a disposition to disturb or harm anyone, except the testimony discloses that sometime prior, the dog had run at Mrs. Minnie Biebel the Mother of the plaintiff.

We think however, the evidence was sufficient for the jury to find that the dog had the propensity of attacking and biting mankind, as the record discloses that the Smith boy did nothing to molest or aggrevate him in any way, and that his attack on him was wholly unprovoked and was of a vicious character.

On the second proposition as to whether the defendant knew of the vicious character of the dog and of its propensity to bite mankind, prior to his biting the plaintiff, the evidence is conflicting. One Herman Kloess was working with the defendant on the day in question in and about cleaning said engine. This witness testified that Mr. Lehman's son, Philip, a boy about twelve years of age came to the mine between ten and half past ten of that day; that he saw him in the boiler room; and that he heard this boy say to his father "That the dog had bitten a child in the yard but he did not say who the child was." This witness further testified that the defendant told his son "To go home and tell them to kill the dog or tie him up out of the way." He further testified that about one o'clock in the afternoon of said day he again saw Philip Lehman with his father in the boiler room, and that he heard him tell his father "That the dog had bitten another boy, that the defendant asked his son who it was, and that the son replied, it was Lawrence Biebel." Kloess further testified that the defendant told his son to go home and tell them to kill the dog or tie him up, and that the father stated, "He was afraid of that, after he had bit the first one." On the other hand the defendant and his son both testified that Philip was not at the mine on the first occasion testified to by the witness, Kloess, and that the first that he had told his father, with

reference to the dog having bitten anyone, was about one O'clock in the afternoon, and that he then told him the dog had bitten the Smith boy and the plaintiff. While only one witness testified on behalf of the plaintiff and two on behalf of the defendant, still we are not able to say that the jury were not warranted in finding that the preponderance of the evidence supported the plaintiff's contention. The credibility of the witnesses was for the jury and it was for them to say to what extent if any, the interest of the witnesses may have affected their testimony. So far as the record discloses, the witness Kloess who testified on behalf of the plaintiff had no interest whatever in the result of the suit, while the defendant would of course have a direct, pecuniary interest therein.

It might be further observed that there has been a previous trial of this case and that the jury on the previous trial found the issues for the plaintiff.

It is next contended by counsel for the defendant that even though the defendant had sufficient knowledge of the character of the dog to make it his duty to get rid of him, still he was not liable for acts done by the dog thereafter, until he had had a reasonable opportunity to get rid of him. Without going into a discussion of this proposition at length, it will only be necessary for us to say that in view of the fact that the defendant at the time in question was working only 450 to 500 ft. from his residence, the jury would be warranted in finding that he had had ample opportunity to secure the dog so that he could not molest anyone or to have killed the dog, prior to the injury to the plaintiff.

It is further contended by counsel for the defendant that plaintiff cannot recover for the reason that the evidence tended to show that he learned in the morning of the day in question that the Smith boy had been bitten by the dog and being advised of this fact, he was guilty of such negligence in going upon the premises or near where the butchering was going on as to bar his right of recovery. The evidence in the record tended to show that the plaintiff had been in the habit of going to defendant's home for the purpose of playing with defendant's son, and in the forenoon of the day in question the plaintiff had been sent with another boy on an errand for one of the men doing the butchering. This errand required the boys to go to a neighbors and return to the defendant's home, so that it cannot be said that the plaintiff was a trespasser. Taking the plaintiff's age, intelligence, capacity and experience into consideration he was not guilty of such negligence as would as a matter of law bar his right of recovery. It must be borne in mind in this character of case that the negligence or lack of care on the part of the plaintiff is a matter of defence.

In C. & A. R. R. Co. vs. Kuckkuck, 197 Ill. 308, the Court at page 308 says:

"Judge Cooley says that the doctrine of contributory negligence applies to the case of injury by animals, and if a man heedlessly places himself on the premises of another in a way of a bull which he knows to be vicious and dangerous, he has no lawful ground for complaint if he is gored. (Cooley on Torts, 346). It is a rule however that the public are en-

titled to act upon the presumption that all dangerous animals are properly confined and they need not exercise any especial care or caution for their protection." The Court in the same opinion on page 309 says:

"It is undoubtedly the rule in this State that if the party injured has been guilty of heedlessly placing himself in the way of a vicious dog with knowledge of its propensities, or has brought the injury upon himself by his own conduct, or his fault has proximately contributed to his injury, such facts will constitute a good defense. This defense, however, depends upon knowledge, and it is only after notice that the public are required to be on their guard to avoid injury. It is not necessary for a plaintiff to aver and prove the exercise of care and caution for his own protection, but it is a matter of defense."

There is nothing in the record to show that the plaintiff prior to and at the time of the injury in question knew that the dog was in and about the place where the men were butchering. Counsel for defendant stated in his brief that the plaintiff was: "Even twice warned by one of the butchers to get away lest the dog bite him, he disregarded and lingered about until he was bitten." The record fails to show that the man who spoke to the plaintiff said anything about the dog. He told him he had better stand back or move away, but didn't tell him why. The plaintiff testified that he did not know why he was requested to move away and immediately following the statement to him, the dog ran out and bit him.

It is next contended by defendant in error that the court erred in refusing certain of the instructions offered by the defendant, one of the instructions referred to is as follows:

"The jury are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not so established his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases, your verdict should be 'Not Guilty.' "

We are of the opinion that this instruction substantially states a correct principle of law and in our judgment should have been given. However, we are not prepared to hold that its refusal is sufficient to require a reversal of the case especially in view of the fact that the court gave to the jury on behalf of the defendant an instruction stating to them, that before the plaintiff can recover, it must appear from a preponderance of the evidence that the defendant was the owner or kept the dog in question; that said dog had a propensity to attack persons, and that the defendant knew of such propensity before the plaintiff was bitten.

The Court also gave on behalf of the defendant, this instruction:

"The court instructs the jury even though you should find from a preponderance of the evidence that the dog in question was vicious and had a propensity to attack persons still unless you should also find that the defendant knew of such propensity prior to the injury in question you should find the

defendant not guilty." The jury were fully instructed that before the plaintiff could recover, he must prove the different elements of his case, by a preponderance of the evidence. We are therefore of the opinion that no substantial injury was done the plaintiff by reason of the court's failing to give said refused instruction.

We find on examination, that as to the other two instructions offered by defendant, and which were refused by the court, that the court did not err in refusing the same. The second refused instruction is abstract in form and the principle undertaken to be stated therein was not stated as definitely and accurately as it should have been. The third refused instruction undertook to call the attention of the jury to certain parts of the evidence and directed a verdict thereon. The Court did not err in refusing the same.

In the assignment of error and statement of the case, it is set forth that the verdict of the jury is excessive. This assignment of error was not referred to in the argument of the case and therefore we would not be required to refer to it here. The verdict is amply large but we do not feel that it is so excessive, that we can say that the jury in fixing the same were moved by prejudice or passion and unless we can do so, in this character of case, we would not be warranted in reversing the judgment for that reason. The record discloses that the injury to the plaintiff was a very severe one. The calf of his left leg was badly lacerated. He was confined to his bed some five to seven weeks and required attention both night and day. Said leg is still scarred and disfigured; and is smaller than the other. In the judgment of the physician who treated him it will always remain so.

It is also contended by defendant that the court erred in refusing to direct a verdict on motion made by him at the close of the plaintiff's evidence and again at the close of all the evidence. What we have already said in this opinion sufficiently disposes of that assignment of error. There was ample evidence in the record, which if true, taken with all inferences reasonably to be drawn therefrom, fairly tended to prove the plaintiff's cause of action. The Court did not err in refusing to direct a verdict.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported.

Term No. 47. Agenda No. 46.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

CORA HARDACRE, Appellee, vs. JAMES HARDACRE, Appellant.	Appeal from Lawrence County, Circuit Court.

Opinion by Boggs, P. J.

An action in assumpsit brought in the Circuit Court of Lawrence County in September 1922, by appellee against appellant, her former husband, for board, clothing and other necessaries furnished by her to Lester James Hardacre, their son, from November 28, 1919 to September 10, 1921, resulted in a verdict and judgment against appellant for $906.08. To reverse said judgment appellant prosecutes this appeal.

The record discloses that appellant and appellee separated along in November 1914, at which time their said son was seven years of age. At the time of the separation the parents entered into a contract settling their property rights with a provision that the wife should have the care and control of the son until he was twelve years of age and that appellant was to contribute to his support and maintenance the sum of $150.00 per annum. After said child became twelve years old he continued to live in the home of his mother and by her was supplied with board, clothing, medical attention and other necessaries. In 1916 the appellant secured a divorce from appellee in the Circuit Court of Lawrence County.

It is first contended by counsel for appellant that the court erred in permitting appellee to testify from a copy of the account sued on, instead of offering the account in evidence. While we are of the opinion that appellee's use of said memorandum should have been restricted by the trial court more than it was, still we do not believe the error of such a character as to require a reversal of the case, especially in view of the fact that no complaint was made by appellant in the motion for a new trial or in the assignment of errors that the verdict is excessive and the further reason that the other evidence in the record corroborated appellee's testimony for the greater part of said amount sued for.

Appellant further contends that the court erred in refusing to admit the contract of separation and an additional agreement entered into between said parties at the time of the separation, giving the custody, care and support of the child to its mother. We have examined said contracts and are of the opinion that the court did not err in refusing to admit

same in evidence as they did not purport to cover or affect the issues in this case.

The main contention of counsel for appellant for a reversal of this case is that appellee being the divorced wife of appellant and having received into her custody said minor child, should be held to have assumed the obligations incident thereto. In other words, that where a wife leaves without justifiable cause and takes her infant child with her, the husband is not liable, upon the theory that if there is a legal obligation it must be on the ground that the father is entitled to the custody and services of his child.

The evidence clearly shows in this case that the father, the appellant, refused to provide a home or furnish any articles necessary for the care of the child after it became twelve years of age and that the child was supported by the mother and maintained in her home from December 1919 to September 1921 as charged in the declaration. We do not agree with the contention of counsel for appellant, that because the child was willing or preferred to stay in the home of his mother and thereby deprived the father of the association of the child, that he could be relieved of his legal liability to support the child. Especially, in view of the fact that the evidence does not show that he made any effort to secure the association of his child.

There is a legal obligation resting on the father to support his minor children, and while it is essential that there must be either an expressed or implied promise on the part of the father to hold him liable for necessaries furnished his minor child by a third person, yet where the parents separate and the father permits his infant child to remain with its mother, the father constitutes the mother his agent to provide for his child and he will be liable for necessaries furnished it by the mother. (McMillen vs. Lee, 78 Ill. 443. Parsons on Contracts, page 307.)

The fact that the parties to this proceeding have been divorced does not relieve the father from his obligation to support his minor son. Parkinson vs. Parkinson, 116 App. 112; Plaster vs. Plaster, 47 Ill. 290; Panther Creek Mine vs. Industrial Commission, 296 Ill. 565.

In Parkinson vs. Parkinson, supra, this Court in discussing a question of this character on page 114 says: "The effect of the divorce was to leave the parties, in legal status, the same as if they had never been married. The rights of the appellee in her claim against appellant for support of the children is in no way affected by parental or marital relationship. In Plaster vs. Plaster, 47 Ill. 290, on the petition of a divorced wife for an order of allowance against the father for the support of a minor child in her custody, the court aptly defines the duty and obligation of the father as held by all decisions in this state when that questin has been raised. 'The law of nature, the usages of society, as well as the laws of all civilized countries, impose the duty upon the parent of the support, nurture and education of children. This duty devolves first upon the father, and next upon the mother, so long as they are of tender years and unable to provide for themselves.' "

The right to maintain a suit of this character is fully warranted by the authorities. Complaint is made that the court made prejudicial remarks during the trial of the case. This point was not raised on the motion for a new trial or in the assignment of errors and therefore cannot be raised here for the first time. We have, however, examined the remarks complaind of and do not find anything prejudicial in connection therewith. No complaint is made of the ruling of the court on the instructions.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported.

Term No. 7. Agenda No. 38.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error, vs. DALE DANA, Plaintiff in error.	Error to Crawford County Court.

Opinion by Barry, J.

Plaintiff in error was tried, convicted and fined for a violation of the Prohibition Act of 1921. He contends that the evidence is insufficient to support the verdict; that the Court gave erroneous instructions, and that improper evidence was admitted. The evidence is such that we would not be warranted in holding that it is not sufficient to justify the verdict.

The second and third instructions given for the prosecution pertain to the effect of the flight of the accused to avoid arrest. Counsel admit that they accurately state the law but contend that there was no sufficient evidence upon which to base them. The sheriff and the Chief of Police testified that the night plaintiff in error was apprehended he asked them to not lock him up and he would give his word of honor that he would appear the next morning. He says he does not recollect such a conversation, but in the next breath says that he saw his lawyer and told him he had an urgent call to go to Tennessee; that the lawyer asked him if he had been arrested or served with any papers; that the lawyer told him if he had not been arrested or served with papers he could go; that he told the lawyer that he had promised the sheriff to come up the next morning.

We can not agree with the contention that there was no sufficient evidence upon which to base the second and third instructions. The fourth instruction is an accurate statement of the law and was properly given, People vs. Scarbok, 245 Ill. 435. The sixth is in reference to the weight to be given to the testimony of the defendant and the only complaint made is that it singles out the defendant. Such an instruction could not do otherwise because, "The defendant's relation to the case is different from that of any other witness, and if any instruction in regard to the method of determining his credibility is to be given, he must necessarily be particularly singled out and the attention of the jury called specially to him," People vs. Harrison 261 Ill. 517-525.

The ninth instruction was approved in People vs. Zajicek 233 Ill., 198 and in other cases. The objection to the twelfth instruction is well taken as it should not single out the wit-

nesses for the defendant, but the eighth directed the jury to apply the same rule to all the witnesses in the case, so the error can not be considered to be of a serious nature. Counsel did not set out, in the abstract, the instructions given for the defendant and we could, very well, refuse to consider the alleged errors in the Court's rulings on the instructions given for the prosecution.

It has been repeatedly held that error can not be predicated upon the giving, refusal or modification of instructions unless all the instructions are set out in the abstract, for the reason that there may have been other instructions given which cured the errors complained of, Reavely vs. Harris, 239 Ill. 526-531; People vs. Goodman, 283 Ill. 414; Thompson vs. People, 192 Ill. 79; City of Roodhouse vs. Christian, 158 Ill. 137.

The Court committed no error in its rulings on the admission or exclusion of evidence.

As no reversible error has been pointed out the judgment must be affirmed.

Affirmed.

Not to be reported.

Term No. 18. Agenda No. 44.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. B. C. CROMEENES, Plaintiff in Error.	Error to County Court of Pope County.

Opinion by Barry, J.

An information filed in the County Court charged that, on July 15, 1917, plaintiff in error "unlawfully and wilfully did then and there interrupt and disturb the peace and quiet of the neighborhood and family of one Elda Buchanan by then and there entering the dwelling house of the said Elda Buchanan and then and there taking hold of Vitura Buchanan and then and there putting his hands upon the breast of her, the said Vitura Buchanan". A motion to quash the information was overruled, a plea of not guilty filed and upon the trial the jury returned a verdict of guilty as charged in the information. Motions for new trial and in arrest were overruled and judgment entered on the verdict and the Court imposed a fine of $50.00.

It is apparent that the information was intended to charge a violation of Cahill's Statutes Ch. 38, par. 143 which provides: "Whoever wilfully disturbs the peace and quiet of any neighborhood or family, by loud or unusual noises, or by tumultuous or offensive carriage, threatening, traducing, quarreling, challenging to fight or fighting, * * *, shall be fined not exceeding $100.00".

In our opinion the information is wholly insufficient to charge the commission of an offense under that section of the Statute. The facts averred, if true, might be made the basis of a charge of assault and battery but can not be construed as one of disturbing the peace. The motion to quash the information should have been sustained and the judgment is reversed and cause remanded with directions so to do.

Reversed and remanded with directions.

Not to be reported.

Term No. 37. Agenda No. 35.

IN THE APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

JAMES MARFIA, Appellee, vs. EMMA L. TULLEY, Appellant.		Appeal from Madison Circuit Court.

Opinion by Barry, J.

The trial court restored a certain provision of a lease on the ground that it had been erased by appellant after the execution and delivery of the instrument and without the knowledge or consent of appellee.

Dr. Tulley, husband of appellant, owned the premises for many years. In 1917 he conveyed a half interest to his wife. They were covenants, thereafter, until the spring of 1920 when appellant purchased her husband's interest. The lease in question was executed by the covenants to appellee who had been a tenant of the premises for about ten years prior to July 1919.

Mr. Schmidt was agent for the Tulleys and looked after the property, the procuring of tenants and the collection of rent etc. In the spring of 1919 appellee wanted a new lease but the premises needed repairs and he informed the said agent that he would not take a new lease and make the repairs unless he could get a lease for ten years. The Tulleys were then in California and had been for sometime. Their agent wrote them in regard to appellee's proposition and appellant replied as follows:

"I will be glad to give Marfia a lease if he will go ahead and fix up his place as he says, but we must know just what he is going to do first and all about it before we sign the papers as he might change his mind." Mr. Schmidt wrote her again and on May 12, 1919 she replied:—"I am perfectly willing to sign a lease for Marfia. He has been a good renter and never made trouble. I think he ought to take a lease for five years with the privilege of five more. He don't need to worry. I will see that everything is done right for him and he knows I don't break my word. Tell him not to worry one minute about it."

Mr. Schmidt also wrote to Dr. Tulley about the matter and he replied on April 17, 1919 as follows: "In regards Jim Murphy, as far as I am concerned he can have a five year lease, with an option for five years more, but he will have to give a good and sufficient bond to protect the property."

Mr. Schmidt and appellee had a lease prepared in duplicate dated July 11, 1919 for a term of five years from Aug. 1,

1919 with a provision that "Second party has right to renew said lease until 1929 at same rental by notifying first party in writing on or before May 1, 1924." Appellee signed both copies of the lease and Mr. Schmidt then sent them to Dr. Tulley. It is conceded that the said clause was in both copies of the lease when Dr. Tulley received them.

Dr. Tulley says that he took the leases to his lawyer, Mr. Miles, and asked him to draw new leases and that Mr. Miles said he was busy and that all that would be necessary would be to strike out the objectionable clause and to return the same document. He says that Mr. Miles then handed them to his stenographer with instructions to strike out the clause and that she did so. He is corroborated by Mr. Miles and the stenographer but Mr. Miles is positive that appellee had not signed the leases at that time. This, however, is contrary to the fact. Mr. Miles acted as attorney for appellant in taking the depositions of his stenographer and Dr. Tulley and his partner acted as her attorney in taking Mr. Miles deposition.

Dr. Tulley says that he signed the leases after the clause was stricken and that he then sent them to appellant. She says that when she received them they had been signed by her husband and appellee and the clause had been stricken. That her husband sent her the leases with a letter but that he said nothing about the stricken clause. She says she was not surprised when she found that the five year extension was stricken because she knew it was against her husband's principles to grant a ten year lease. She says she never wanted appellee to have more than a five year lease. She says that she signed the leases and sent them to her agent Schmidt but said nothing to him about the stricken clause.

Mr. Schmidt and his wife say that when the leases were received from appellant they examined them and found that the clause had not been stricken. Mr. Schmidt says he then took them to appellee's store and laid them on the counter and told appellee to take his choice and that appellee took one copy and he kept the other as agent for the Tulleys. Appellee then called in his friend Edmund Hall, who is a civil engineer, and asked him to examine the lease and see if it was in proper shape for him to go ahead with the improvements he intended to make. Mr. Hall says he then read it over to appellee and that the clause had not been stricken and appellee testified to the same effect. Within two days thereafter appellee began making the improvements on the premises. He put in a new tile floor and metallic ceiling, put on new paper and painted the woodwork at an expense of about $2500.00.

One evening in the spring of 1920 appellant asked Mr. Schmidt to borrow appellee's copy of the lease for her as she wanted to see it that night and it was not convenient to get her copy. Mr. Schmidt procured appellee's copy and took it to appellant who was sitting at her typewriter. He sat down and visited with her for sometime during which time she operated the machine but he did not notice what she was doing. Before leaving appellant handed him the lease and he took it back to appellee who, without examining it, put it back in his safe.

Some months later appellee had a prospective buyer who asked to see his lease and when produced it was found that the clause in question had been stricken. The clause was typewritten and had been stricken on a typewriter by running hyphens through it. Appellee accused appellant of having changed his lease and she denied it.

The original lease has been certified to this court for our inspection and it shows on its face that it was altered at sometime. In Waggoner vs. Clark, 293 Ill. 256, at page 260, the court said:—"In Walters vs. Short, 5 Gilin 252, it was sought to have the court adopt the presumption that an alteration was contemporaneous with the execution of the instrument, and the court refused so to do but left it to be explained by the evidence as a question of fact. It may therefore be taken as well settled in this state that there is no presumption of law that an instrument has been altered from its condition when executed but that this is a question of fact, and the party producing such instument is called upon to explain the alteration. This court has uniformly required that an alteration or interlineation shall be explained by the party claiming the benefit of the paper, and if it is suspicious in appearance and a satisfactory explanation is not made, the conclusion will be against its validity."

Alterations, interlineations and erasures in a lease which change the legal effect and operation of the instrument and the liability of the parties, should be explained by the party seeking the benefit of the lease before it is received in evidence, Landt vs. McCullough, 206 Ill., 214; Catlin Coal Co., vs. Lloyd, 180 Ill., 398.

Appellant insists that she is charged in the bill with the commission of a criminal offense and that it was incumbent on appellee to prove his case beyond all reasonable doubt and cites Germania Fire Ins. Co., vs. Klewer, 129 Ill. 599 and other cases. In Oliver vs. Oliver, 110 Ill., 119 the bill charged that the defendant inserted his own name in a deed in place of the complainant's name after the deed had been executed and delivered and the court held that the complainant should prove his case by clear and convincing evidence. In Riggs vs. Powell, 142 Ill., 453 the court held that a charge of fraud and forgery should be proved by clear and satisfactory evidence.

In Grimes vs. Hilliary, 150 Ill., 141 at page 146 the Court said:—"It does not follow, that because an element may have entered into the act which would have rendered it indictable as a crime, but which is not alleged or necessary to be proved to authorize a recovery in the civil action, the proof must be made beyond a reasonable doubt."

It is not very material which of the foregoing rules is applicable to this case. The evidence is such that a court of review would not be warranted in holding that appellee had failed to prove his case beyond all reasonable doubt.

It clearly appears that appellee would not make the improvements unless he could get a ten year lease and this fact was communicated to the lessors. This appears from their letters and from them it also appears that in April and May 1919 they agreed that if appellee would make the improve-

ments he could have a lease for five years with the privilege of five more. He had leases prepared accordingly and signed the same and they were sent by the agent to Dr. Tulley.

The fact, that the leases were altered after appellee had signed them, is fully established. It is conceded that no one called the attention of appellee to the alteration. He was not advised that the lessors or either of them had changed their minds in regard to the length of time for which the lease was to be given. No excuse was offered for striking the clause from the lease so soon after both lessors had agreed to sign a lease containing such a clause. No excuse was offered for their failure to inform their agent or appellee that they had altered the lease before they signed it. Four witnesses testified that when the lease was delivered it had not been altered.

Appellant's attitude in regard to those matters is wholly inconsistent with the terms of her letter of May 12, 1919 in which she stated that she was perfectly willing to sign for appellee such a lease as the one in question before it was altered. At that time she assured him that he need not worry for a minute about it, that she would see that everything was done right for him and that he knew she doesn't break her word.

Appellee is a foreigner who can neither read nor write English. Appellant's letter indicates that she knew this fact and that she felt it her duty to see that everything was done right for him. If the lease was altered after appellee signed it and before it was signed by appellant and her husband good faith and fair dealing should have prompted Dr. Tulley and appellant to inform appellee of the alteration.

It is very evident that appellee expended about $2500.00 for improvements on the faith of the lessor's agreement that he should have a lease for five years with the privilege of five more. In her answer to the bill appellant admits that he made improvements on the property but avers that they were made under the lease as altered and that she as owner of the building is entitled to the same and admits that she had informed appellee that after Aug. 1, 1924 he will have no further right, title or interest in the premises.

If the clause was stricken before the lease was signed by Dr. Tulley and his wife and appellee was not informed of the alteration before he accepted it and made the improvements there can be little doubt but that appellee would be entitled to have the lease reformed and that appellant should be estopped from claiming the benefit of the alteration.

Under the facts in this case we are of the opinion that it would be contrary to law and abhorrent to reason and justice to sustain the contentions of appellant. The ends of justice will be much better subserved if she is required to do what was so agreeable to her when she wrote the letter of May 12, 1919. With the aid of the decree of the Circuit Court she can make her promise good and thus restore, in a measure at least, the confidence which she desired her tenant to repose in her. The decree is right and should be affirmed,

Affirmed.

Not to be reported.

Opinion by Barry, J.

Term No. 38. Agenda No. 20.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

NATIONAL CASH REGISTER CO., Appellant, vs. JOSEPH W. MEYERS, Appellee.	Apeal from Madison Circuit Court.

Opinion by Barry, J.

Appellant sought to recover on a note for $826.50 which appellee had executed for deferred payment on the purchase price of a cash register. The general issue and a special plea of failure of consideration were filed and upon the trial a verdict and judgment were rendered in favor of appellee.

Appellee says that when he contracted for the register appellant agreed to install it in his place of business and teach him how to operate it. He also says it was never installed and that he has never seen it. Appellant's agent, who made the sale, testified that the register was shipped to appellee at Alton, Ill., and that he refused to take it from the railroad company. He says that when he sold it to appellee he did not agree to install it for him or to instruct him in the operation of it or that if it did not work satisfactorily appellee was not to take it. He was then asked: "Did you just sell him the cash register without making any agreement to install it or to explain the operation of it?" And his reply was: "No agreement just a verbal understanding with him, but no agreement".

In view of that answer it is not strange that the jury reached the conclusion that the verbal understanding was an agreement. As there was no written contract of sale it was the peculiar province of the jury to weight the evidence and determine upon what terms the register was sold. Apart from any contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery, Uniform Sales Act, Sec. 43, Cl. 1.

There is nothing in the testimony on behalf of appellant to show that the place of delivery was not to be at appellee's place of business. Appellant contends that a delivery to the carrier was a delivery to appellee and that no further proof was required to entitle it to recover. That contention can not be sustained.

Under Section 41 of the Uniform Sales Act it was the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, *in accordance with the terms of the contract.* Section 46 clause one of that Act provides: "Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed a delivery of the goods to the buyer, *except in the cases provided for in Section 19, Rule 5, or unless a contrary intent appears*".

Section 19, Rule 5, of the Act provides: "If the contract to sell requires the seller to deliver the goods to the buyer or at a particular place, X X X, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon".

From all of the evidence in the case there is no escape from the conclusion that the place of delivery was appellee's place of business in Alton, Ill., and that appellant failed to deliver at that place.

Appellant contends that the court erred in refusing all of its instructions. All of them, except the third, were abstract propositions of law and utterly ignored appellee's defense and the provisions of the statute above referred to. The first told the jury that *ordinarily* a delivery to the carrier is a delivery to the purchaser. The third was to the effect that if they believed from the evidence that the cash register was contracted for by appellee and that it was made in compliance with the contract and was delivered to the carrier usually employed in the transportation of goods from the place of the seller to that of appellee then the property passed from appellant to appellee and there was a delivery in law and the jury would be authorized in finding in favor of appellant. That would not be true if a contrary intention appeared. The instruction ignored appellee's defense and the provisions of the statute aforesaid. No complaint is made as to the court's rulings on the evidence. Finding no error in the record the judgment is affirmed.

Affirmed.

Not to be reported.

Ag. No. 47 Term No. 42

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1922.

THE NATIONAL STATE BANK, Apellant. vs. GEORGE RAMPENDAHL, et al. Appellees.	Appeal from Massac Circuit Court.

BARRY, J.

Appellant filed its bill in which it averred that on September 2, 1920, Louisa Rampendahl was indebted to it in the sum of $1,000, as evidenced by a note for that amount dated May 18th, 1920, due September 18, 1920, signed by her and H. Rampendahl, Jr., Co., Inc.; that on September 2, 1920, the said Louisa Rampendahl was the owner of a house and lot in the city of Metropolis, Ill., and that on that day she conveyed the said premises to her son George for one dollar and love and affection; that the said grantor was then and there largely indebted, financially embarrassed and insolvent and the making of said conveyance rendered her wholly unable to pay her debts.

The bill avers that the conveyance was but a gift and was intended to cheat and defraud appellant out of its said claim and to place the said property in a secret trust out of its reach; that on June 11th, 1921, appellant recovered a judgment on said note for $1100.00 and costs of suit upon which an execution was issued and the same was levied upon the premises so conveyed as aforesaid. The bill prays that the said conveyance be set aside to the extent of subjecting the said premises to the payment of said judgment and costs.

Appellees by their answer denied all of the material averments of the bill and alleged that at the time of the conveyance the grantor was solvent and retained ample property to meet all of her debts. Upon a hearing the Court dismissed the bill for want of equity.

The record discloses that the judgment recovered by appellant was not rendered upon the note dated May 18, 1920, but upon a note dated May 18, 1921. There is no averment in the bill that the note upon which judgment was taken, was a renewal of the note of May 18, 1920. It appears from the evidence, however, that the note of May 18, 1920, was renewed on Sept. 18, 1920. The latter note was renewed on Jan. 18, 1921, and that note was renewed on May 18, 1921. It was upon this last note that judgment was rendered.

A complainant can not avail himself of any claim established by the proof which is not alleged in his bill, even though

it appears in the evidence, Millard vs. Millard, 221 Ill. 86. If appellant desired to rely upon the fact that he was an existing creditor at the time of the conveyance by virtue of the note of May 18, 1920, and that said note was renewed from time to time until judgment was taken upon the final renewal note he should have so averred in his bill. The averment as to the note of May 18, 1920, with proof that judgment was taken upon a note executed a year later without averment that it was a renewal of the original note would not entitle appellant to relief.

Without averment in the bill that the note upon which judgment was taken was a renewal of the note of May 18, 1920, appellant stands in the position of a subsequent creditor who can only attack the deed on the ground of actual fraud, Phillips vs. North, 77 Ill. 243, of which there is no evidence in the record.

The record discloses that Louisa Rampendahl, on Sept. 2, 1920, was not indebted to any one except appellant, whose debt was $1000.00 and evidenced by the note mentioned in the bill. She had signed that note as surety for H. Rampendahl Jr. Co., Inc. At the time of the conveyance the premises in question were worth about $2,000 to $2500 and she conveyed the same to her son for one dollar and love and affection. She retained a life estate in the premises conveyed and then had 165 shares of the capital stock of H. Rampendahl Jr. Co. Inc., of the par value of $16,500 and 70 shares of the capital stock of the Metropolis Towing Co. of the par value of $7000.

The record discloses that in May, 1920, the capital stock of the Towing Co. was increased from $50,000 to $100,000, the increase being subscribed for and paid in cash, and that its property was worth $170,000 or more. The other company had a capital stock of $50,000 represented by its plant at $40,000 and $10,000 in cash when organized.

Fore several years prior to Sept. 2, 1920, both companies had been in business at Metropolis and had been prosperous. The Rampendahl Co. was engaged in the manufacture and sale of slack barrel staves and heading and the other company was subsidiary thereto. During the fall of 1920 and up to Jan. 31, 1921, the company was selling staves at $30.00 per thousand and heading at 25 cents per set and had orders that would require the full operation of the plant for several months at prices allowing a net profit of $2,000.00 per week.

Between Jan. 31, 1921, and May 1st, 1921, prices declined but they were still operating at a profit. After May 1st prices declined more rapidly until July 1st, when staves were selling for $7.50 per thousand and heading at eight cents per set. The only witnesses who testified on the subject say that both corporations were solvent on Sept. 2, 1920, and continued so for several months therefater.

The evidence shows that 50 shares of the capital stock of the Rampendahl Co. sold for $5,000 in the summer of 1920 and that in Dec. 1920 Louisa Rampendahl sold 25 shares of her stock in that company for $2500.00. It appears, therefore, that a small part of the property she retained after the conveyance of Sept. 2, 1920, sold for $2500.00. Unless we disregard the sworn testimony and undisputed facts we must con-

clude that the two companies were solvent on Sept. 2, 1920, and that she retained property that was then fairly worth about $23,500.00.

It does not appear that she or either of the companies was largely indebted or financially embarrassed on Sept. 2, 1920, or that subsequent insolvency resulted because of any indebtedness that then existed, but the unfortunate desults were due to the unexpected, and unusual rapid decline in prices which was nation-wide and not confined to any particular line of business.

Where a debtor, at the time of making provision for his future support, retains in his hands what is then amply sufficient to pay his debts, in the shape of notes on solvent parties, the subsequent insolvency of the makers of the notes will not necessarily render the provision in favor of the debtor fraudulent as to creditors, Harting vs. Jockers, 136 Ill. 627.

In Emerson vs. Bemis, 69 Ill. 537 at page 541 the Court said: "The true rule, by which the fraudulency or fairness of a voluntary conveyance is to be ascertained in this respect, is founded on a comparative indebtedness; or, in other words, on the pecuniary ability of the grantor, at the time, to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment."

"The mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift to the child was a reasonable provision according to the state and condition in life, and leaving enough for the payment of the debts of the grantor." Patterson vs. McKinney, 97 Ill. 41-47. In the same case on page 50 the Court said: "There does not appear to have been any reduction of the debtor's property from any unexpected loss which might not reasonably have been calculated upon."

In the case at bar the grantor was in debt to no one except appellant and it was but $1,000. After making the conveyance she retained stock in the corporation which was worth according to the evidence $23,500. The property conveyed to her son was worth $2,000 to $2500, or about one-tenth of her estate. Several months later there was an unusual and unexpected loss to the corporation in the rapid decline in prices which in a few months resulted in financial ruin. If the corporations were perfectly solvent and their property had been destroyed by fire with no insurance, no one would seriously contend that the conveyance should be set aside on the ground that there was fraud in fact or in law. We see no reason then why it should be set aside when the loss was almost as sudden and from a cause so unusual and unexpected as disclosed by the evidence.

In our opinion the decree is right and must be affirmed.

AFFIRMED.

Not to be reported.

Term No. 56. Agenda No. 41.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

FRED MONTINE, SR., Appellee, vs. DARLING & CO., Appellant.	Appeal from St. Clair Circuit Court.

Opinion by Barry, J.

Appellee recovered a judgment for $1,800.00 for damages to his growing corn alleged to have been caused by appellant. He charged in his declaration, that appellant while engaged in the manufacture of commercial fertilizer so operated its plant as to cause injurious acids and gases to be thrown into the air and that the wind carried them into and upon his premises in the vicinity and that his growing crop, by reason thereof, was greatly damaged and most of it destroyed. The facts alleged constitute a nuisance and it was not necessary to aver or prove that appellant was guilty of negligence, Laflin & Rnd Powder Co. vs. Tearney, 131 Ill. 322.

When a manufacturer of commercial fertilizer operates its plant in such a manner as to generate acids and gases which escape into the surrounding atmosphere, and are carried by the wind upon the premises of another whereby his growing crops are damaged or destroyed he is entitled to recover therefor, U. S. Smelting Co. vs. Sisam, 191 Fed. 293; 37 L. R. A. (N. S.) 976; Frost vs. Berkeley Phosphate Co., 26 L. R. A. (S. C.) 693; Susquehanna Fertilizer Co. vs Malone, 9 L. R. A. (md.) 737; Fogarty vs. Junction City Pressed Brick Co., 50 Kan. 478; 18 L. R. A. 756; Campbell vs. Seaman, 63 N. Y. 568; Pennsylvania Lead Co's. Appeal 96 Pa. St. 116; 20 R. C. L. 451. "If", says Blackstone, "one erects a smelting house so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance", Pennsylvania Lead Co's. Appeal, 96 Pa. St. 116.

The evidence shows, beyond question, that sulphuric acid is generated at and escapes from appellant's plant. Its counsel admit that the testimony of the expert witnesses for appellee shows that his crop was damaged by acid of that character. They argue, however, that it was not proven that the acid which did the damage came from their client's plant. That no reasonable inference can be drawn from the evidence that the damage was caused by appellant and that the verdict of the jury is based on a mere conjecture that "such was the fact."

This argument is based on the alleged fact that sulphuric acid was used in and escapes from the plant of the Monsanto

Chemical Co., and that such acid is present in the smoke from soft coal and that a large amount of such coal was burned in the plant of the Indiahoma Refining Co., that both of said plants were in the neighborhood of appellee's premises.

The evidence shows that appellant's plant is south or south-west of the premises of appellee and that the plants of the other companies are north and east thereof. It shows that on June 9, 1921 the corn was about 3½ feet high and the ears were shooting, that the weather was wet and foggy for two days and the wind was from the south or south-west and when it cleared the leaves on the entire crop had turned brown from the top downward. The location of the other plants and the direction from which the wind was blowing at the time the damage was done negative the idea that it may have been caused by acid from such other plants. The jury was fully warranted in drawing the inference that the corn was not damaged from that source.

In a case the proof was that the fumes of each of four smelters contributed to the injury of the plaintiff's crops. The defendant owned one of them and the others were owned by strangers to the action. It was contended that there was no substantial evidence as to what part of the injury to the crops was caused by fumes from the plant of the defendant. The court took into consideration the location of each plant with reference to the plaintiff's crop, the prevailing winds during the growing season, etc., and said:—"The amount of that injury would still be conditioned by the distances of the respective smelters from the land, by the direction and duration of the winds during the growing seasons, and by the humidity of the atmosphere. Moreover, the question here is not whether or not the plaintiff produced the best or the most reliable, or all the evidence of which this issue was susceptible. It is, was this evidence, which is condeded to have been competent and material, so slight, indefinite, and insubstantial that the jury could not lawfully be permitted to find from it the portion of the damage to the crops of the plaintiff which the fumes of the defendant's smelter caused? A careful reading and thoughtful consideration of all the evidence upon this subject has forced our minds to the conclusion that there was evidence upon this issue in this case so substantial and definite that the court below fell into no error in submitting it to the jury," U. S. Smelting Co. vs. Sisam 37 L. R. A., N. S.) 976-982.

Counsel argue that the damage may have been caused by worms, but the evidence does not support that contention. In answer to such argument in a similar case the court said:—"The fact that, where one has sustained injury at the hands of another, it appears that he has also sustained injury from causes other than the act of the wrong-doer, will not, in our judgment, relieve the wrong-doer from liability to respond in damages for the injury which he has caused," Frost vs. Berkeley Phosphate Co., 26 L. R. A. (S. C.) 693.

It is argued that the damage may have resulted from poor cultivation or dry, hot weather or the condition of the soil, but such contention is not supported by the evidence. In our opinion the court did not err in submitting the case to

the jury or in its rulings on the evidence and instructions. In regard to the court's remarks that are complained of it is sufficient to say that no objection or exception was taken to the same nor was any reference made, thereto, in the motion for a new trial.

Counsel argue, that the court erred in allowing an expert witness to answer a hypothetical question which did not contain all of the necessary facts but the record shows that the objection was general. To raise the question now presented counsel should have pointed out, specifically, the elements alleged to be omitted, Riverton Coal Co. vs. Shepherd, 207 Ill. 395. The evidence which was lacking in the case of O'Connor vs. Aluminum Ore Co., decided by this court on April 1, 1922 is present in the case at bar and what we there said does not, in any way, conflict with the conclusions herein announced. We can not say that the verdict is excessive. The judgment is affirmed.

Affirmed.

Not to be reported.

56

Term No. 3. Agenda No. 12.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

AUGUST NIESMANN, Appellee, vs. JOSEPH HARRIS, Appellant.	Appeal from City Court of East St. Louis.

Opinion by Higbee, J.

The facts upon which this case appears to be based are substantially as follows: In August 1920, a man by the name of Wamser owned and was conducting a restaurant in East St. Louis. Mrs. Elizabeth Potts contracted to buy the restaurant for $1,142.00 on the following terms: $500.00 to be paid in cash, and the remainder in monthly installments of $50.00 each, the deferred payments to be secured by notes and chattel mortgage upon the restaurant equipment. She had $200.00 of her own money and in order to make the cash payment borrowed $300.00 from appellant who was a railroad engineer, lodging in a rooming house then conducted by her near the restaurant. She carried on this restaurant until November, 1920, when the business having proved unprofitable she borrowed another $1,000 from appellant with the verbal agreement, as testified by appellant, that if she were unable to repay him the $1,300.00 he might have the restaurant property. About February, 1921 as she had failed to pay some of the installments due to Wamser he threatened to foreclose his chattel mortgage for the balance due thereon of $292.00. Thereupon appellant executed his notes and a chattel mortgage to Wamser securing the $292.00 and later in April, 1921. paid Wamser the balance due him. A short time afterwards appellant sold the restaurant property to a Mrs. McGinn for $750.00 of which $250 was paid in cash and the balance secured to be paid in monthly installments of $50.00 each. Mrs. Potts continued to conduct the restaurant business up until the time of the sale by appellant to Mrs. McGinn. During this time she bought her groceries, meats and other supplies from appellee and this suit was brought to recover from appellant the amount due appellee for such supplies furnished Mrs. Potts. It is contended by appellee that Mrs. Potts in operating the restaurant was acting as the agent of appellant. Sometime after the sale of the restaurant property to Mrs. McGinn, Mrs. Potts filed a voluntary petition in bankruptcy and on July 1, 1921 was adjudicated a bankrupt. Both appellant and appellee filed claims against her estate. In mak-

ing up the schedule of her property Mrs. Potts did not schedule the property which had been sold by appellant to Mrs. McGinn. There was a hearing in the bankruptcy court on the question whether or not this property belonged to Mrs. Potts, and should have been scheduled by her. The referee found that the restaurant equipment was the property of Mrs. Potts and that her transfer of it to appellant was invalid as to creditors.

Appellee has not filed any brief or argument in this appeal, and the judgment could under the rules of this court be reversed pro forma, but upon examination of the record, we have deemed it proper to consider the merits of the case presented by the appeal. On the trial of the case the court below admitted in evidence a transcript of the evidence on the hearing in the bankruptcy court. In our opinion it was error to introduce in evidence the transcript of the testimony upon the hearing in the court of bankruptcy. It does not appear to have been introduced for the purpose of contradicting appellant but for the purpose of proving appellee's claim that appellant was the owner of the restaurant business and not the owner of the property used in carrying on the business. This evidence was given in a case not between the same parties not involving the same subject matter, and under a well established line of authorities under such circumstances such testimony was not admissible except for the purpose of contradiction.

The court also refused all the instructions offered by both parties and upon its own motion gave the jury the following instruction: "The jury are instructed that the question here is whether Mrs. Potts was the agent of Harris or whether Harris was merely letting Mrs. Potts have money to buy the property and run the business. If she was not his agent in the transaction here shown by the testimony the plaintiff cannot recover and the verdict should be for the defendant. If Mrs. Potts was the agent of Harris in the making the grocery bill of the plaintiff, then the defendant is liable and the plaintiff is entitled to a verdict for whatever may be due on the bill sued on". The jury returned a verdict for $1,246.00 "with interest at five per cent" and judgment was entered on that verdict for $1,295.32.

A person who seeks to hold another liable as an undisclosed principal in a transaction has the burden of proving the agency by a preponderance of the evidence. (31 Cyc. 1644). So in this case appellee had the burden of proving that Mrs. Potts was acting as the agent of appellant, yet the court refused instructions offered by appellant requiring the jury to find such agency from a preponderance of the evidence, and the instruction given by the court did not require the jury to find such agency from a preponderance of the evidence or from the evidence at all. Where the trial court declines to give any of the instructions offered by one or both of the parties and prepares written instructions of its own the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury has been done the defeated party by refusal of the instructions asked by him. (Wacaser vs. People, 134 Ill. 438). The only

instruction given in this case did not fairly and accurately instruct the jury and without doubt injury was done appellant by the refusal of the instructions asked by him. It was clearly error to give the instruction which was given and to refuse the instructions asked by appellant, relating to the burden of proof.

For errors herein pointed out the judgment appealed from is reversed and the cause remanded.

Reversed and remanded.

Not to be reported.

Term No. 9. Agenda No. 22.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

MINNIE FERRERO, Defendant in Error, vs. THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Plaintiff in Error.	Error to City Court of East St. Louis.

Opinion by Higbee, J.

This is an action brought by defendant in error on a benefit certificate issued by plaintiff in error to Paul Ferrero in which defendant in error, his wife, was named as beneficiary. The certificate was issued January 31, 1919, and the insured died in the Anna State Hospital on April 29, 1921. To the declaration as finally amended plaintiff in error filed special pleas setting up the defenses of Suicide, attempted suicide and attempted re-instatement of the insured while in poor health. The evidence shows that the insured attacked his wife, the defendant in error with an axe or hatchet at their home in Tilden, Illinois, on April 8, 1921. She ran from their home screaming and covered with blood, leaving no one in the house but the insured and their three children aged 2, 6 and 8 years respectively. When nearby neighbors entered the home they found the insured sitting in a chair with his throat cut and a razor half opened and covered with blood on the floor near him. The insured was admitted to the State Hospital for the Insane at Anna, shortly after this occurrence, where he died May 10, 1921. The contract of insurance provided that all by-laws of plaintiff in error then in force or thereafter enacted should be considered as a part of the contract. The policy contained the provision "if the member to whom this certificate is issued shall die by said member's own hand whether sane or insane then such member shall receive only one-fifth of the amount of the certificate less the amount due the reserve fund." A by-law enacted after the policy in question was issued provided that the beneficiary should only be entitled to recover if the insured committed suicide, the amount actually paid by the member to the benefit fund. The amount paid into the benefit fund by the insured in this case was $31.10. On the trial of the case it was stipulated that if defendant in error was entitled to recover any amount other than the premium paid, she was entitled to recover the sum of $952.00. The jury returned a verdict in favor of defendant in error in the sum of $952.00 and the judgment was for that amount. The defendant in error in making out her

case in chief introduced in evidence the proofs of death which she had submitted to plaintiff in error as required by the certificate. Among such proofs was a statement signed by the President, Financier and Secretary of the local association to which the insured belonged, which gave the cause of death of insured as "aspiration pneumonia." There was also included a statement by Dr. Curtis A. Hunsaker who as coroner held an inquest over the body in which he said that the verdict of the jury at the time of the inquest, was "aspiration pneumonia." In answer to the question "did deceased commit suicide?" the coroner stated "from evidence submitted wound in neck made with razor by himself with suicidal intent before being admitted to Anna State Hospital." Among these proofs was also an affidavit by defendant in error in which she gave the cause of death as "aspiration pneumonia." Defendant in error testified that she did not read any of the proofs of death save her own affidavit. Upon the trial plaintiff in error introduced a physician and some attendants at the State hospital who testified that the deceased told them he inflicted the wound upon himself.

At the close of defendant in error's evidence plaintiff in error asked the court to give a peremptory instruction in its behalf. The court refused to give this instruction and it was again offered at the close of the case and again refused. The only grounds urged for reversal of this judgment by plaintiff in error are that the trial court erred in refusing to give its peremptory instruction, and that the verdict is contrary to the manifest weight of the evidence. Each of these contentions is based upon the ground that the evidence shows that the death of deceased resulted from an attempt to commit suicide by cutting his throat. Plaintiff in error is not in a position to urge as error the refusal of the trial court to give the peremptory instruction at the close of defendant in error's evidence as by offering evidence on its part after the close of defendant in error's evidence, it made a submission of the case upon the whole evidence and thereby waived its right to insist upon any claimed error committed by the court in refusing the peremptory instruction at the close of defendant in error's evidence. (Knight Templars Indemnity Co. vs. Crayton, 209 Ill. 550).

It is urgently insisted by plaintiff in error that the proofs of death introduced in evidence by defendant in error show that the deceased died as the result of a wound inflicted in an attempt to commit suicide and that these proofs were introduced in evidence generally and without limiting such introduction to the purpose of proving compliance with the terms of the policy requiring such proofs to be made. The claim of plaintiff in error is that it would have been sufficient for defendant in error to show simply that she had furnished the proofs, but that instead of doing so, she introduced the proofs themselves in evidence without at all limiting the purpose for which they were introduced, and that having been introduced as evidence generally they must be considered in all on their parts and effect must be given to all that they prove or tend to prove; that since, as it is contended, the proofs show that the deceased came to death at his own hands the same is

conclusive upon defendant in error, and the court should have given the peremptory instruction requested and that the verdict is contrary to the evidence.

One of the defenses relied upon by plaintiff in error was that the deceased committed suicide and this defense was fully set forth in one of its pleas. It is the law that a benefit society has the burden of showing that the deceased committed suicide where such defense is relied upon, notwithstanding the proofs of death tend to show that fact. The burden of establishing this plea was upon plaintiff in error and it was a question of fact to be decided by the jury. An examination of the proofs of death in this case, does not disclose any definite or satisfactory statement that the deceased's death resulted from a self-inflicted wound. The question of the cause of the death of the insured and the question of his attempted suicide were submitted as questions of fact to the jury who found in favor of defendant in error. But even if the proof had shown that the death resulted from suicide or that there had been an attempt at suicide on his part, these defenses were waived by the plaintiff in error by accepting payment of dues after the wounds were received by deceased, and statements in reference to the manner his wounds may have been caused made by the insured after he had been adjudged insane would not be binding on his beneficiary. Modern Woodmen vs. Anderson, (71 Ill. App. 351).

The evidence shows that the wounds were received April 8 and that dues were collected by the local financier of plaintiff in error on April 23, 1921. Drangold vs. Royal Neighbors, 261 Ill. 60; Love vs. Modern Woodmen 259 id. 102; Palmalee vs. Court of Honor, 212 Ill. App. 565. Upon the whole case we cannot say that the verdict was so manifestly against the weight of the evidence as to demand a reversal of the judgment. The judgment will therefore be affirmed.

Affirmed.

Not to be reported.

Term No. 28. Agenda No. 42.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

C. G. BOYAJIAN, Appellee. vs. CHARLES SARAFIAN et al., STEPHEN SARAFIAN and HARRY KALAGIAN, Appellants.	Appeal from City Court of East St. Louis.

Opinion by Higbee, J.

This is an action of trover brought by appellee, who alleges in his declaration that on February 9, 1921, he sold to Charles, Harry and Stephen Sarafian partners doing business as the Illinois Candy Kitchen, certain restaurant property and as part of the purchase price thereof said partners gave appellee a chattel mortgage on certain fixtures in the sum of $630.00 securing 21 promissory notes of $30.00 each, maturing at different dates; that by the terms of such chattel mortgage appellee was entitled to take possession of said chattels upon feeling himself unsafe and insecure or upon the mortgagors selling or attempting to sell the same without authority or upon the mortgagors making default in the payment of said notes; that the mortgagors closed up their place of business and caused appellee to feel himself insecure and unsafe; that said parties defaulted in the payment of said notes and did sell the property without consent of appellee whereby appellee was entitled to the immediate possession of such chattels; that the appellant Harry Kalagian purchased said chattels at said sale, took possession of the same and removed them to ports unknown to appellee; that this mortgage was recorded February 11, 1921 in the proper office.

The proof shows that on April 14, 1921, Charles Sarafian gave a chattel mortgage on the same property to Stephan Sarafian purporting to secure the payment of a note for $1,000.00 due 18 months after date. This mortgage was not recorded until September 2, 1921. Appellant Kalagian claims to have purchased this property at a sale under this mortgage. On the trial of the case the court refused to allow appellee to introduce in evidence the said mortgage given to him. This refusal seemed to have been based upon the fact that the mortgage was not signed by all three of the parties. Appellee, however, testified as to the giving of the mortgage and the amount secured thereby and due thereon without objection. It appears from the proof that default had been made in the payment of two of the notes at the time appellee first

attempted to take the property. Upon trial the jury returned a verdict in favor of appellee for $430.50. The trial court after overruling a motion for new trial entered a judgment on this verdict from which judgment Stephen Sarafian and Harry Kalagian have perfected this appeal.

The grounds upon which appellants insist this judgment should be reversed are stated by them as follows: (1) Because there is no evidence in this record to show that appellee Boyajian had any mortgage on the restaurant fixtures mentioned in his declaration; (2) Because if appellee Boyajian did have any chattel mortgage he has lost his lien on the goods for the reason that he failed to foreclose his mortgage and take possession of the restaurant fixtures after default in payment by the mortgagor, and so failing to reduce the goods to his possession after default in payment that the appellee Boyajian's mortgage became null and void and a fraud per se to other creditors and mortgagees; (3) The appellee, Boyajian has failed to prove by a preponderance of the evidence that he made a demand on these two appellants, Stephan Sarafian and Harry Kalagian before he commenced his suit in trover; (4) The evidence shows that the appellant, Harry Kalagian purchased these restaurant fixtures at a public sale from a constable, who sold the said fixtures under a chattel mortgage given by Charles Sarafian to Stephen Sarafian.

As to the first ground urged by appellant, we are of the opinion the court should have admitted in evidence the mortgage to appellee. However, appellants cannot be heard to object as it was refused on their own objection. Appellee, without any objection on the part of appellants, stated that the mortgage was given and also the amount secured thereby and due thereon. Under their second contention appellants seem to take the position that in order to keep his lien alive appellee should have taken possession of the property or foreclosed his mortgage within a reasonable time after first default was made in payment of the notes. Such however is not the rule. Under a mortgage securing a debt due in installments the mortgagee has a right to declare the whole debt due and payable upon default in payment of the first installment but he is not bound to do so. He may elect to wait until the whole debt is due and default has been made in its payment and the lien and priority of the mortgage is not impaired by so doing. (Woodward vs. Donovan, 167 Ill. App. 503). Appellee's lien therefore could not have been lost until after the last installment or note became due.

Appellee testified that he demanded possession of these goods from appellant Stephen Sarafian and his attorney testified that he demanded such possession from appellant Kalagian. So that if a demand in this case was necessary and the evidence fully shows that demand was made and would warrant a finding in favor of appellee on that question.

Even though appellant Kalagian did purchase these goods at a sale under the mortgage given by Charles Sarafian to Stephen Sarafian he acquired no rights therein superior to those of appellee if, as is shown by the proof, appellee had a good mortgage on the chattels in question duly executed and

recorded prior to the time the mortgage to appellant Kalagian was executed. The verdict in this case is warranted by the proofs, we find no reversible error in the record, and the judgment will therefore be affirmed.

Affirmed.

Not to be reported.

Term No. 29. Agenda No. 15.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

M. H. STEFFEY, et al., Appellees, vs. OHIO OIL COMPANY, a corporation, Appellant.	Appeal from Lawrence.

Opinion by Higbee, J.

On August 14, 1907, John Steffey and wife, executed and delivered to J. K. Putman, an oil and gas lease on some 234 acres of land owned by John Steffey in Lawrence county, Illinois. It was provided in the lease that it should "remain in force for a term of fifteen months from this date and as long thereafter as oil and gas or either of them is produced therefrom by the party of the second part, its successors or assigns"; and that "after completion of the first well, a well is to be completed every six months until said land is fully developed or thereafter pay $1.00 per day such completion is delayed or forfeit all but ten acres in the form of a square around completed well" and "all covenants and agreements herein set forth between the parties hereto shall extend to their survivors, heirs, executors, administrators and assigns". These are all the material provisions in the lease involved in this case. This lease was assigned by Putman to the Ohio Oil Company, appellant, on November 16, 1907. John Steffey died April 15, 1908, and the appellees herein are his children and grandchildren. His widow, Anna Steffey died January 21, 1915.

There was a partition suit of the lands described in the lease in 1912, in which the west one-half of the southwest quarter of section 28 in township 5 north, range 11 west in said Lawrence county, was set off to his widow, Anna Steffey as her dower and homestead in and to the lands owned by said John Steffey in his lifetime. The remainder of the lands described in the lease was sold to H. K. Steffey and W. A. Pinkstaff. On February 14, 1913, appellant signed a written instrument releasing the lands bought by H. K. Steffey from the oil lease above mentioned and on January 29, 1914, W. A. Pinkstaff and appellant executed a similar release as to the lands bought by Pinkstaff. In both of these releases it was expressly provided that the lease should remain in full force as to the lands set off to the widow. Appellant was made a party defendant to the partition suit of the John Steffey lands. The decree in the partition suit expressly found that said oil and gas lease was still in full force and effect as to

a portion of the lands set off to the widow as her dower and homestead and that the same was subject to said lease. This suit was brought by the heirs of John Steffey to recover damages under the lease above set forth, at the rate of $1.00 per day for failure to fully develop the west one-half of the south west quarter of section 28 being the lands set off to the widow as her dower and homestead and which passed to the heirs upon her death. Appellants filed a plea of the general issue and eight special pleas. The first special plea simply denied the allegations of the declaration and alleged that appellant had complied with the terms of the lease and had fully developed the land and had ceased to drill thereon only after becoming convinced the lands were not productive of the oil and gas.

The second special plea alleged that the lease was an entirety; that appellee sought to recover damages for only a portion of the lands involved in the lease; that any damages which might be recovered should be due to all the owners of the lands described in the lease. The third special plea alleged that after the making of the lease appellant had drilled five wells on the different tracks of land described in the lease two of them being located on the lands involved in this suit, one of which was found to be a small producer and one to be non-productive; that appellant after having been to great expense and loss in developing the lands released all of the lands from the lease except those involved in this suit, and that they had at a great deal of loss and expense to themselves found such lands to have been fully developed and non-productive of oil and gas, and therefore appellant was exonerated from any damage for not having drilled further. The fourth special plea alleged that appellees were not all the heirs at law of John Steffey deceased. The fifth special plea set forth the partition suit in 1912 of the John Steffey lands and claimed the same as a bar to this action for the reason that the same was an adjudication of the demand made upon appellant in this suit. The sixth special plea set for the cancellation of the lease as to all the lands other than those involved in this suit, and asserted that by reason of such cancellation appellant was exonerated from all claims, demands and payments due or to become due under said lease as to those portions of the land covering which the lease was cancelled. The seventh special plea set up the ten year statute of limitations. The eighth special plea set up the five year statute of limitations. Appellee filed a similiter to the plea of general issue and replications to all the special pleas save the eighth. To the eighth plea a demurrer was sustained by the court. Issues were joined upon the replications and upon a trial with a jury a verdict for $1198.75 was returned in favor of appellees. This appeal seeks a reversal of the judgment entered on that verdict.

It appears from the evidence that practically no oil and gas was found on lands east or south of the lands involved in this suit, but that oil had been found to the northeast, northwest, and southwest of said lands. The first well drilled under this lease was shown to have been commenced in July, 1908 in the northwest corner of the southeast quarter of the

southeast quarter of section 29. It was completed in August, 1908 but being a dry hole was abandoned. The second well was completed in September, 1908 in the northwest corner of the lands involved in this suit. This well was a producer and still produced to some extent at the time of the trial. The third well was drilled in the northwest corner of the east one-half of the northwest quarter of section 32 and was completed in November, 1908, but being non-productive was abandoned. The fourth well was drilled in 1909, 450 feet south of the third well, but was soon abandoned. The fifth well was located on the land in question about 270 feet east of the first well drilled on this land. This well was completed August 18, 1910 but soon failed to produce and was also abandoned. These were all the wells drilled on the lands originally covered by the lease in question before this suit was commenced. The only one of them which was producing oil at the time of the institution of this suit was the second well drilled on the land with which this suit is concerned. At the time of the commencement of the suit this well was producing about 15 barrels per week. It is contended by appellant that the evidence shows from the drillings done on all the lands described in this lease and other adjoining lands, that the lands involved in this suit had been developed to such an extent as to show the same were unproductive, or in other words had been fully developed under the lease.

In December, 1920, appellant was notified by the parties in interest that it had forfeited all right, title and interest in the lands described in the declaration except as to ten acres in the form of a square around the completed well, by reason of its failure to complete a well on said tract every six months after the completion of the first well on said land and appellant was notified to surrender possession of said lands except ten acres in the northwest corner around the completed well and was requested to release and cancel the lease from the records of the circuit clerk of Lawrence county. Appellant failed to surrender or cancel the lease in compliance with such notice and this suit was brought on the 16th day of August, 1921. After the suit was instituted appellant drilled two wells on the involved lands one of which appears to have been a producing well.

It is first contended by appellant that the evidence shows the lands involved in this case were fully developed to such an extent as to show that they were non-productive lands, and that under the lease appellants, acting in reason and good faith had the right to determine when such lands were fully developed. We do not consent to the theory advanced by appellant that it was the sole judge of the extent to which the premises should be developed in order to comply with the provisions of the lease even though it had acted in good faith in reaching the conclusion that the lands had been fully developed. It was held by the Supreme Court in Daughetee vs. Ohio Oil Company, 263 Ill. 518 that under a lease held by the court to contain requirements somewhat similar to the one herein involved there was an implied obligation on the part of the lessee to use reasonable diligence to develop the demised premises so long as the enterprise could be carried on

at a profit. It was also said in the opinion. "Plaintiff in error contends that where the lessee has committed no fraud and has acted in good faith and has not drained oil from lessor's premises by means of wells on other adjacent lands, he is not liable for a failure to drill and operate additional wells if, acting on his own judgment, he believed that it would not be profitable for him to do so; or, differently stated, the contention is that plaintiff in error was the sole judge of the extent to which the premises should be developed, and it is only required to use good faith in order to exempt itself from damages for a failure to properly develop the demised premises. While the lessee undoubtedly had the right to exercise his honest judgment in respect to the extent and manner of development under a lease of this character, still it will not do to say that his determination is final and not subject to investigation or review." This would seem to dispose of the contention of appellant as to the theory therein discussed. It was therefore a question of fact to be determined by the jury whether or not appellant had as provided by its lease drilled a well every six months until the lands had been fully developed and we are of the opinion, in view of the fact that a producing well was drilled on the premises in question after the institution of this suit, that the evidence clearly sustains the finding of the jury in this respect. If appellant believed that the lands had been fully developed it had the right under the lease to terminate the same on the payment of $1.00. This right it did not see fit to exercise as it had done in respect to the other lands described in the lease. The partition suit did not effect the right of appellees to bring suit and recover in this case. Appellant was a party to that suit and the decree expressly found that this lease was in effect as to a portion at least of the lands involved in this suit. Appellant failed to comply with the request made on it to cancel the lease and surrender possession of the land except ten acres around the completed well but by its own act released the other lands from the operation of the lease and in the several releases signed by it agreed that the lease should remain in full force as to this land. It cannot therefore be heard to say that the owners of the other lands should be parties to this suit.

No claim is made that the damages are excessive and but little complaint is made concerning the giving and refusing of instructions. Some of the instructions offered in behalf of appellant and refused by the court might well have been given, yet after a careful review of all the refused instructions, we find that no proper instructions were refused which were not already covered by instructions given. On the whole the jury appears to have been correctly instructed as to the law applicable to the case. The judgment herein will be affirmed.

Affirmed.

Not to be reported.

Term No. 30. Agenda No. 27.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

F. B. MILLER,
Appellee,
vs.
SALINE COUNTY COAL COMPANY, a corporation,
Appellant.

Appeal from Saline.

Opinion by Higbee, J.

Appellee recovered judgment against appellant at the September Term 1921 of the Circuit Court of Saline County for the sum of $1533.31. Appellant has brought the record in that suit here and seeks to reverse the judgment.

In our opinion all the questions presented by this record were substantially decided and covered by this court in the case of Morris vs. Saline County Coal Company 211 Ill. App. 178. However since it is attempted to make certain distinctions between the facts in that case and the facts in the instant case we deem it best to make a rather full statement of the facts herein involved.

On December 14, 1906 John J. Parish and Annie F. Parish, his wife, were the owners as tenants in common of certain real estate near Harrisburg in Saline County including the premises involved in this suit. On that date said John J. Parish and Anna F. Parish executed a lease or contract for the right to mine and remove the coal underlying said lands to Samuel W. McCune, which lease provided that the lessees should not be liable for surface subsidence in the following words: "without any liability for surface subsidence by mining out the coal or for not leaving pillars or artificial supports under the land." This lease was never recorded and the coal lands so far as shown by the record were never taken possession of by the lessee under said lease. In May 1907 Samuel W. McCune the lessee above named assigned the foregoing lease to the appellant. Sometime prior to July 12, 1907, an arrangement was entered into by F. B. Miller, appellee and W. R. Smith, E. E. Dennison, John J. Parish, John Shaw and R. S. Marsh for the subdividing and platting of said premises into lots and for advertising and selling the same. On the 12th day of July 1907 a written agreement was entered into between said F. B. Miller and W. R. Smith as parties of the First Part and E. E. Dennison, John J. Parish, John Shaw and R. S. Marsh as parties of the second part providing that the parties of the second part were the owners of said premises and desired to have the same platted into lots and blocks and sold as an addition to Harrisburg. It was

agreed that the parties of the first part should have the said lands surveyed, staked and platted into lots and blocks and to advertise and sell the same, and that out of the sale the first $18,000.00 should be paid to the parties of the second part as a consideration for the land, and then after the payment of expenses and other items enumerated the profits and loss should be divided or shared between the parties as follows: the said F. B. Miller and W. R. Smith should receive one-fifth each and the other three-fifths should be divided between the parties of the second part. By deed dated July 9, 1907, acknowledged July 15, 1907 and recorded July 27, 1907 Parish and his wife conveyed to E. E. Dennison one of the parties to above mentioned contract, the tract of land above described, reserving the right to mine and remove the coal thereunder. ~~On July 27, 1907, Parish and his wife conveyed to E. E. Dennison one of the parties to above mentioned contract, the tract of land above described, reserving the right to mine and remove the coal thereunder.~~ On July 27, 1907 E. E. Dennison conveyed the above described lands back to Parish as trustee "to be held in trust for the use of E. E. Dennison, John Shaw, R. S. Marsh, F. B. Miller, W. R. Smith and J. J. Parish, giving to said trustee full power to survey, sub-divide, plat, sell and convey by lots and blocks all the interest, right and title of the above named beneficiaries in the land described herein." This deed also reserved the right to mine and remove the coal under said lands and was recorded on July 27, 1907. By the time this deed was executed it seems that the premises had already been surveyed and platted as there was at that time filed in the recorder's office a plat of the same, together with the certificate of the surveyor and a map thereof.

On August 30, 1907, John J. Parish and Annie F. Parish, his wife, made and executed to appellant a lease or contract giving to said Company the right to mine and remove the coal underlying said lands. This lease provided that the lessee should have the "right and privilege to excavate, mine, take out and remove all of the coal from or on said premises without any liability for surface subsidence occasioned thereby." It was also stated therein, "it is hereby further understood and agreed that upon the execution of this lease that a certain lease, executed under date of December 14, 1906, between the first parties heretofore and Samuel W. McCune, subsequently assigned by said Samuel W. McCune to the Saline County Coal Company, shall become null and void." This lease was recorded February 27, 1908. It appears from the record that in November 1911 the parties to the deed and contract above set forth concerning the platting and dividing of these lands, decided to close the business and apportion and divide the lands left on hand. Pursuant to such decision John J. Parish as trustee, on November 24, 1911, conveyed to appellee the lands involved in this suit.

It also appears that sometime prior to 1915 appellant began mining the coal from beneath these premises, and as a result thereof, during 1915 the surface of the lands owned by appellee subsided and this action was brought to recover damages for such subsidence. The declaration contained two counts the first charging a negligent removal of the coal and

wrongful neglect and failure to leave sufficient supports. The second count charged that appellant so removed the coal that it failed to leave sufficient support for the surface of said lots.

There are only two material differences between the facts in this case and the facts in the Morris case Supra against the same defendant. Those differences are as follows: The contract for sale of lots to Morris in the former case was made on July 27, 1907 which was prior to the execution of the second mining lease to appellee on August 3, 1907, while the deed to appellee in this case was not made until November 1911. The other difference is that Morris plaintiff in the former case, was not a beneficiary under the trust deed from Dennison to Parish, and was not a party to the agreement or contract for the platting, sub-dividing and selling of these premises. In our opinion these differences do not effect the law controlling the facts in this case, and our decision in the Morris case supra, must govern this case.

It is contended by appellant that the parties to the contract concerning the platting and selling of the premises were partners; that Parish, one of the so-called partners knew of the lease to McCune which was assigned to appellants, and that such knowledge was notice to him of the existence of such lease, the same as though it had been recorded, and that this notice to Parish was also notice to his co-partners including appellee. It is also contended that the execution of the deed to Dennison and of the deed from Dennison to Parish as trustee, was simply an arrangement for the carrying out of the partnership agreement, and that therefore appellee could not take under a deed from the trustee free from notice of the appellant's contention that they were released from any damage for subsidence of the surface.

This position in our opinion is not well taken. As we held in the Morris case the execution of the new lease on August 3, 1907 expressly by its own terms cancelled the former lease. Neither do we think the rule of law that notice to one partner is notice to his co-partners, would apply under the state of facts in this record. Any notice to Parish or knowledge which he may have had concerning this lease came to him in his individual capacity, and not while he was dealing with the partnership. Such notice to him in that capacity would not be notice to his co-partners. It should be barne in mind that when John J. Parish and Anna Parish deeded the land in question to Dennison reserving the right to mine the coal they severed the ownership of the surface of the land and the mineral thereunder, and two separate and independent estates existed. It is well settled in this state that the surface of the land and the underlying mineral are separate estates which may be owned individually. (Ames vs. Ames 160 Ill. 599 and Catlin Coal Co. vs. Lloyd 176 Ill. 275) That being true John J. Parish could not thereafter by a lease or any instrument pertaining to the mineral rights effect the interests of the owners of the surface. The lease of August 3, 1907 which abrogated the former lease was not made until after the severage of these two estates, and it is under this latter lease that appellant claims it is released from any damages by the subsidence of the surface of these lands.

It is also contended that since Parish as trustee was empowered to convey a fee simple title in these lots to the purchasers thereof that he was by the trust deed invested with the fees simple title, and that therefore the lease of the mineral rights which he made on August 3, 1907 would be binding upon his grantees under the trust deed. Neither do we believe that this position to be well taken. If it is granted that he held the fee simple title as trustee, it must be conceded that the terms of the deed he held it for the benefit of the beneficiaries named therein, and that the same could not in any way merge into the ownership which he had reserved of the mineral rights thereto. Again at the time the land was conveyed to him in trust the lease of August 3, 1907 to appellant was not in existence so that he could not take it with notice of the provisions of that lease and the lease of December 14, 1906 was cancelled by this latter lease.

We must hold as we held in the Morris case that the first mineral lease of December 14, 1906 was cancelled by the mineral lease of August 3, 1907, and that any knowledge or notice to Parish, individually or as a trustee or as a partner, of the first lease would not be notice or knowledge of the second lease since the land was conveyed to him as trustee before the execution of the second lease. He therefore acquired the land as trustee without any notice or knowledge of the second lease, and since the second lease was made by persons not interested in the surface of the land any provision in such contract or agreement concerning the surface would not be binding upon the owners thereof. Therefore Parish as trustee could convey the surface of the land free and clear of any agreements pertaining to the surface in the lease of August 3, 1907, and his grantee, the appellee, became the owner of the surface of the lands herein involved free of any provisions in this lease even though at the time of the deed to him he knew of the existence of the second lease.

We are therefore of the opinion that the difference between the facts in this case and the facts in the Morris case are not of such a substantial character as to warrant us in reaching a different conclusion as to the disposition of the appeal in this case from that reached in the former case.

The judgment in this case will therefore be affirmed.

Affirmed.

Not to be reported.

Term No. 33. Agenda No. 30.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

E. B. DICK, Appellant, vs. THE FIRST NATIONAL BANK, Appellee.	Appeal from Franklin.

Opinion by Higbee, J.

Prior to July 15, 1919, one Thomas Gledja of Christopher, Illinois, was the owner of stock certificate number 4699 of the Perfection Tire and Rubber Company representing 5,800 shares of the capital stock of said Company of the par value of $1.00 each. The main office of this company was at Ft. Madison, Iowa, and its stock was listed on the New York curb market. At that city there was maintained an office for the transfer of stock of said company. On the back of the certificate was a printed form of assignment. On the above date Gledja sold this stock to appellant, E. B. Dick and affixed his signature to the assignment in blank. On the same date appellant delivered this stock so signed in blank to appellee, the First National Bank of Christopher, Illinois, to be sold on the New York curb market. On the 16th day of July, 1919 appellee forwarded this certificate to Stix and Company, St. Louis brokers, who on July 18, forwarded the same for sale to Newborg and Company in New York. On the 16th or 17th of July this stock was sold on the New York market and the proceeds of such sale amounting to $8,178.18 was by Stix & Company remitted to appellee and such amount placed to the credit of appellant. Appellant drew on this account until about the first of August following when he departed for the state of Texas by the way of Springfield and Joplin, Mo. In the meantime it appears that Gledja by some means had stopped the transfer of said stock at the transfer office in New York and thus prevented the consummation of the sale made by Newborg & Company in that city. On August 4, Stix and Company through the First National Bank of St. Louis, drew on appellee bank, for the sum of $7,844.50 which they claimed to be the amount they were out on the transaction. This draft drawn on appellee bank was charged to the amount of appellant. On the same date appellee wired a traveling companion of appellant at Springfield, Missouri as follows: "Tell Dick Gledja stock returned account of injunction. Charging his account. Will hold awaiting advice."

This message was received by appellant on the 5th of August and he replied by wire as follows: "Hold money and have Rob Hickman take charge of case and wire me at Joplin,

Mo., if necessary to return home." This message was received by appellee on the morning of August 8. Appellee confirmed its telegram of August 4, to appellant by letter which reached appellant at Wichita Falls, Texas about the 11th or 12th of August. Appellant returned to Christopher and on or about the 18th or 19th of August went to appellee bank and took up the matter with the President and Cashier. It appears that after appellant had drawn on his account, the draft which was charged to his account left him overdrawn. As a result of the conversation between appellant and the president and cashier of appellee, appellant deposited his check with the bank in the amount of his overdraft and the stock certificate was returned to him. On the 19th day of August appellant and Gledja settled the differences between them and evidenced such settlement by a signed written statement reciting that the stock had been fully paid for by appellant, and that all differences between them had been adjusted. It also appears that on behalf of appellant this settlement was negotiated by Bob Hichman above referred to, as his attorney. With reference to this settlement Gledja testified that he told Mr. Hickman attorney for appellant who came to him about the matter that he was willing to pay what he had received back to appellant if appellant did not want the stock. Another witness testified that soon after appellant returned from Texas he stated that he was going to hold the stock and make some money on it.

It further appears that in September, 1919 the Perfection Tire and Rubber Company held a meeting of its stockholders at which the par value of its stock was increased from $1.00 to $10.00 per share, and that appellant attended this meeting. Prior to that time he had forwarded stock certificate No. 4699 assigned to him by Gledja to the Secretary of the Company and had issued to him in lieu thereof stock certificate No. 105013. After the stockholders meeting above mentioned there was issued to him in lieu of stock certificate 105013, certificate No. 301633 representing 580 shares of the Company of the par value of $10.00 each. It was shown by the evidence that for some months after stock certificate No. 4699 was returned to appellant the market value of this stock remained practically the same as it was on that date. Later the market value of this stock began to decline until at the time of the institution of this suit the stock was practically worthless on the market. On August 23, 1920 appellant instituted a suit to the September Term, 1920 of the Franklin county circuit Court to recover from appellee $7,844.50, the amount of the draft which appellee had in July, 1919 charged to his account in connection with the sale of this stock. On the trial before the court without a jury, judgment was rendered in favor of the appellee, and against appellant for casts.

Complaint is made that the court refused to admit in evidence plaintiff's Exhibits B and C. These exhibits were photographic copies of the original stock certificate No. 4699 and the assignment of the same by Gledja in blank when delivered to appellant. Without any argument it is also urged that the court erred in refusing to admit plaintiff's exhibits M, L and N. These exhibits were respectively a certificate

by the secretary of the Perfection Tire and Rubber Company that certain photographs are true and correct photographs of the face and back of stock certificate 105013, a certificate of the secretary as to the minutes of a meeting of the board of directors of the Perfection Tire and Rubber Company, at which it was decided to increase the par value of the stock of that company to $10.00 per share and also a certified copy of the stockholders meeting of that company held on September 16, 1919, at which such increase in the par value of the stock was perfected. The balance of appellant's argument is devoted in substance to urging that the judgment is contrary to the law and the evidence.

After a careful consideration of this record it appears to us that the proof clearly show this matter was fully settled between appellant and Gledja, and that at that time Gledja offered through appellant's attorney, to return the money to him but that such offer was never accepted and that appellant told another party, a witness in the case, that he was going to hold the stock; that the sock also remained substantially at the same price on the market for sometime thereafter and appellant could have saved himself from any loss if he had desired so to do; that he held this stock for a year until it had very much depreciated in value and he then instituted this suit. We are of opinion there was no reversible error in refusing the admission of the exhibits above referred to and that had they been admitted they could not have affected the finding of the court in this case, and that no other judgment than that rendered could have properly been given by the court.

Judgment affirmed.

Not to be reported.

Term No. 44. Agenda No. 39.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

SAMUEL J. DOUMAS, Appellant, vs. A. M. LEVY, Appellee.	Appeal from Madison.

Opinion by Higbee, J.

Appellant, Samuel J. Doumas, brought suit in assumpsit against appellee, A. M. Levy, for work, labor and material he claims to have furnished, and for money claimed to have been expended by him at the request and for the benefit of appellee.

The declaration contained only the common counts. In the month of March, 1921, appellant was in the possession of five lower rooms in what was known as the Tulley building in Granite City, Illinois, which he had rented from Mrs. Emma Tulley for a period of five years. He occupied one of these rooms as a store room and leased three of the other rooms to be used also as store rooms. Appellee, who was conducting a store in the village of Madison near by, desired to lease the vacant one of the five rooms held by appellant under his lease, to carry on a business similar to that conducted by him in Madison. Early in March, 1921, appellee applied to appellant for a lease for the vacant store room, stating, however, that he could not use the same in his business unless certain changes were made therein. There were a number of conversations between the parties which resulted in a proposition on the part of appellee to take a four years lease on the premises for a rental of $100 a month for three years and $115 for the fourth year and to sign a lease to that effect, provided the desired changes in the building were made. After investigation of the costs of making the improvement appellant told appellee that the expense of the same would be so much that he could not afford to make the lease to him. Later, however, appellant, on the recommendation of appellee, procured a contractor who offered to do the work for a price which appellant decided he could afford to pay to secure the lease from appellee. The changes in the building were therefore ordered by appellant to be done and were completed by the contractor. Afterwards appellee desired that the place be painted and papered and appellant had this done. The total cost of all improvements made by appellant in the room was $844.85. While these changes were in progress appellee was absent for about two weeks in New York City. When he returned he presented a lease to

appellant, sometime in April, 1921, which he requested him to sign. Some controversy arose, just what is not clear, but as a result appellant refused to sign the lease. It appears that the two parties then visited Mrs. Tulley, the owner of the building, who stated her willingness that the premises might be sub-let by appellant to appellee. It would appear that there was a controversy between the parties as to the form of a lease to be signed by them, though the contentions of the respective parties in this regard are not shown by the proofs. The upshot was, however, that no lease was executed by the parties and it does not appear from the proof that any lease was ever tendered by appellant to appellee. Appellee having refused to take the building, appellant at once demanded payment for work, labor and material furnished and money expended by him in making the charges in the room desired by appellee, but the latter refused the demand. Nothing is shown by the proofs to have occurred between the parties, bearing upon the question of the lease or the controversies between them until about a year later when this suit was brought against appellee in the circuit court of Madison county.

Upon the trial of the cause a jury was waived by the parties and at the conclusion of the evidence offered by the appellant (plaintiff), the court found the issues for appellee and entered judgment against the appellant for costs. It is substantially admitted on both sides that as there was no written lease executed and the proposed lease was to be made for a term of four years, that such a leasing, even if fully proven, could not be relied upon for a recovery because being for more than one year, it would fall within the statute of frauds. It is, however, claimed by appellant that the court erred in finding the issues against him because he rendered certain services and furnished money to make the improvements in the room in question, at the request of appellee and for his benefit and he contends that the rule is "one who has rendered services in execution of a verbal contract which on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a *quantum meruit*". Butcher vs. Atkinson, 68 Ill. 421. In the case above referred to the plaintiff had been employed verbally to enter the services of defendant for the period of three years and to have the exclusive agency for selling certain goods manufacturd by defendant, in certain territory. He performed the services under the contract for ten months when he was discharged, without cause. The defendant when sued, pleaded the statute of frauds but it was held that the plaintiff might recover what the services performed by him and his expenses were reasonably worth under the *quantum meruit* counts of the declaration. The conditions in that case were in no wise similar to those which exist in the case before us and the rule there laid down cannot be held to be applicable here.

Appellant is suing to recover money expended by him on what was, during the term of his lease, substantially his own property. Appellee never actually undertook to pay for the improvements made nor can it be held that there was an

implied promise on his part to pay for the same. There were negotiations between the parties looking to the leasing of the store room in question by appellee and he had verbally promised to execute a written lease in case certain improvements desired by him were made. The provisions of the lease, except as to the amount of the rental to be paid and the length of time it was to exist, were not agreed upon. When the improvements had been completed, appellee tendered a lease to appellant which had conditions which appellant refused to accept. Appellant, while insisting that appellee enter into a lease, not only refused the one tendered by appellee, but apparently wholly neglected to tender one covering the contract he desired to have appellee enter into. Even from appllant's standpoint, the most that can be said is that appellee was guilty of a breach of his oral contract, but even this is not proven by the evidence as all the terms of the proposed lease do not appear to have been settled. Appellant was clearly not entitled to recover in this case upon the common counts and the trial court rightfully found in favor of appellee. The judgment will be affirmed.

Affirmed.

Not to be reported.

Term No. 51. Agenda No. 48.

IN THE APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

THE PEOPLE ex rel. HELEN HAGEMAN, Appellee, vs. EDWIN S. FRITZ, Appellant.	Appeal from County Court of St. Clair.

Opinion by Higbee, J.

This is an appeal from the county court of St. Clair county, in a bastardy proceeding, wherein relatrix, Helen Hagemann an unmarried woman, charged Edwin S. Fritz, the appellant, with being the father of her child. A jury found the said Edward S. Fritz was "the father of the bastard child of said Helen Hagemann" and the court thereupon entered judgment against said Fritz for the payment of Two Hundred Dollars for the first year and one hundred dollars a year thereafter for the period of nine years.

The relatrix testified on the trial to only one act of sexual intercourse with appellant, which she said was forcible and against her will and took place while she was resisting and fighting to get free. This act, which according to her statement, amounted to the crime of rape, took place as she stated, on the evening of March 22, 1921, at which time she was 17 years of age, and the child was born on November 24, 1921 some eight months and two days later. She further stated that she had never had sexual intercourse with any other person that appellant. On the other hand, appellant who was at the time of the alleged occurrence nineteen or twenty years of age, positively denied that he had sexual intercourse with the relatrix at the time named or at any other time. He also swore that during the whole evening in question he was at home, at his father's and in this he was corroborated by the testimony of his father and mother and a young man who was there visiting his sister. The evidence against appellant, other than the testimony of the relatrix, consisted mainly of certain admissions claimed to have been made by appellant and by his attorney for him.

On the hearing, the trial court permitted the relatrix and one Mrs. Buser, a witness for her, to testify over the objections of appellant to certain statements, charged by attorneys for relatrix as amounting to admissions of guilt on the part of appellant, made by Mr. Horner, an attorney for appellant in the absence of the latter. The testimony objected to was in effect that shortly after the birth of the child, he defendant, Mr. Fritz his father and Mr. Horner his lawyer,

came to see the relatrix at the home of Mrs. Buser, where she was staying; that Mr. Horner said to relatrix that he was glad to see her getting through all right; that there was a young fellow at Lebanon who was anxious to marry her; that he asked her if there was anything they could do for her, if they could help her in any way. The relatrix testified that when these remarks were made by Mr. Horner "the boy and Mr. Fritz were down stairs; they did not stay there when Mr. Horner had his talk with me". Mrs. Buser testified that at the time "the talk" was had with Mr. Horner "the boy was down stairs".

Appellant insists that in admitting these statements of Mr. Horner the court erred because (1) they amounted only to an attempt to compromise and (2) they were made out of the presence of appellant. Counsel for appellee contend that the statements made did not constitute an attempt to compromise or settle, but that they were admissions on the part of appellant that he was the father of the child and that it would be immaterial whether the statements came directly from appellant or were made through his attorney. The theory put forward by appellee's counsel appears to have been adopted by the trial court and it involves the principal question submitted to us on this appeal. The admission of this testimony must have had an important bearing upon the determination of the facts by the jury as without it the right of appellee to recover does not appear to be clear. If the statements made by the attorney for appellant should be considered as constituting an offer of compromise, they were plainly inadmissible. (Paulin vs. Hauser, 63 Ill. 312; C. E. & L. S. Ry. Co. vs. Catholic Bishop, 119 Ill. 525).

Neither do we think appellant should be bound by the statements of his attorney even if not made in an effort to effect a compromise, when made out of court and in his absence, there being no proof that the attorney was directly authorized to him to make the same.

In the case of Chicago City Ry. Co. vs. McMeen, 70 Ill. App. 220, where the trial court admitted appellee's testimony that the attorney for appellant had said that "they considered that they were liable for it (appellee's claim) and would settle it", the Appellate Court held, "this was error, not on the ground that the conversation was in the nature of an offer to compromise but on the ground that what an attorney says is not evidence against his client, unless it be in the nature of a stipulation as to the conduct of the cause. 1 Green Ev. Sec. 186". (See also, Pietsch vs. Pietsch, 245 Ill. 454; Stevens vs. Moody, 204 Ill. App. 451. Appellant's attorney could not have Moody, 204 Ill., App. 451. Appellant's attorney could not have known whether his client was guilty except upon information received by him from the client. If he had been called upon to testify to communications upon the subject with his client, he should not have been allowed to do so. (Helbig vs. Ins. Co., 108 Ill., App. 624.)

In his opening statement to the jury one of the attorneys for appellee said "Her father and next friend had an agreement of settlement made". The court then asked, "Was there an agreement made for settlement here?" And the attorneys

answered, "yes". Appellant objected to these statements and the court directed the jury to disregard them "for the time being". It appears from the record that the same attorney in his closing argument started to make a statement to the jury, calling their attention to the resemblance of the baby to the alleged father. Appellant's counsel objected and the court properly instructed the jury to disregard the statement. Gehm vs. The People, 87 Ill., App. 158. Such statements should not have been made and while under the ruling made by the court, they would not alone constitute reversible error, they can but strengthen the impression that the verdict subsequently found by the jury should not be permitted to stand here when such evidence as was properly admitted shows so very close a case upon the facts.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported.

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